TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. 18

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

L. L. A. TUCKER TRUCK LINES, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

Filed February 20, 1952

Probable jurisdiction noted March 24, 1952

SUPREME COURT OF THE UNITED STATES

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Index Continued.

1 IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

L. A. TUCKER TRUCK LINES INCORPORATED,
a corporation, Plaintiff,

vs.

UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION, Defendants.

Complaint—Filed September 12, 1950.

1. Your petitioner, L. A. Tucker Truck Lines Incorporated, files its petition against the United States of America and the Interstate Commerce Commission to annul, set aside and enjoin an order, hereinafter set forth, of the Interstate Commerce Commission, a commission existing under and by virtue of the Interstate Commerce Act.

2. Jurisdiction of the court is envoked under the provisions of Title 28, U. S. C. A., Sections 2321-1325 inclusive, formerly Sections 41(8), 41(28), 43, 44, 45, 45a, 46, 47, 47a, and 48 of said Act.

3. For its cause of action your petitioner complains in the following manner, to-wit: Your petitioner, L. A. Tucker Truck Lines Incorporated, says that it is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, with its principal place of business in the City of Cape Girardeau, Missouri. Petitioner states that it is a common carrier by motor vehicle engaged in the transportation of general commodities under and by virtue of a certificate of public convenience and necessity issued to it, being Certificate No. MC 3062, a copy of which said certificate is hereto attached and identified as Exhibit *I*, and by reference made a part hereof, the same as though fully set out herein.

2 4. Your petitioner further states that by application filed August 17, 1948, as amended, C. L. Cunningham d/b/a Pemiscot Motor Freight Company, of Caruthersville, Missouri, sought a certificate of public convenience and necessity authorizing an extension of operation, in interstate commerce as a common carrier by motor vehicle of general commodities, with usual exceptions, (1) between East St. Louis, Ill. and Cairo, Ill.; (2) between Chester, Ill., and junction of Missouri Highway 55 and U. S. Highway 61 in Missouri, (3) between McClure, Ill., and Blytheville, Ark., (4) between Cairo, Ill. and Missouri-Arkansas State line, and (5) between Sikeston, Mo. and Memphis, Tenn., over

specified routes, with service at intermediate and off-route points, which said intermediate and off-route points more particularly included Sikeston, Missouri as a service point from St. Louis, Missouri.

5. The above application was assigned Docket No. MC 105120, Sub. No. 3 and was referred to Examiner C. I. Kephart of the Interstate Commerce Commission for hearing at St. Louis, Missouri, on January 27, 1949, at which time numerous parties, including the plaintiffs herein, appeared as intervenors in opposition to the above application.

6. Subsequent to the above hearing and on June 20, 1949, the aforesaid Examiner C. I. Kephart submitted his recommended report and order finding among other things that public convenience and necessity required operations by the applicant, C. L. Cunningham d/b/a Permiscot Motor Freight Company, in interstate commerce as a common carrier by motor vehicle of general commodities, with usual exceptions, over regular routes between St. Louis, Mo.—East St. Louis, Ill. Commercial Zone, as defined in 1 M. C. C. 656, and Sikeston, Missouri among other points and places. A copy of said Report and Recommended Order is hereto attached and identified as Exhibit *II*, and by reference made a part hereof, the same as though fully set out herein.

3 7. Petitioner further states that within time allowed by law and by the rules of the Interstate Commerce Commission, and within such additional time as was granted by said Interstate Commerce Commission pursuant to its rules of practice, the plaintiff herein did file on the 8th day of August, 1949 with the Interstate Commerce Commission exceptions to the Report and Order recommended by C. I. Kephart, Examiner, as above.

8. Petitioner further states that thereafter and on the 18th day of January, 1950 it received the Report and Order of the Commission, Division 5, dated the 13th day of January, 1950, in the above application, in which said report of the Commission, the Commission found "that the present and future public convenience and necessity require operations by applicant (C. L. Cunningham d/b/a Pemiscot Motor Freight Company) as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities, except articles of unusual value, dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467, commodities in bulk, and those requiring special equipment" between St. Louis, Missouri and Sikeston, Matthews, Kewanee, New Madrid, Marston, Conran, Lilbourn, Carton, Parma, Risco, Gideon and Portageville, Mo., among other points and places, a copy of which said

Report and Order is hereto attached and identified as Exhibit *III*, and by reference made a part hereof, the same as though fully set out herein.

9. Petitioner further states that on the 13th day of March, 1950, within the time allowed by law and by the rules of practice of the Interstate Commerce Commission it filed its petition for reopening and reconsideration of the Report and Order of the Commission, Division 5. Petitioner further states that thereafter and on the 4th day of May, 1950 by order of the Commission the above petition for reopening and reconsideration was denied "for the reason that the evidence adequately supports the findings of Division 5," a copy of which said Order is hereto attached and identified as
4 Exhibit *IV*, and by reference made a part hereof, the same as though fully set out herein.

10. Petitioner further states that thereafter and on the 2nd day of June, 1950 it filed with the Commission its Petition for Extraordinary Relief and for Stay of Issuance of Certificate of Public Convenience and Necessity, which said petition was denied by the Commission on the 29th day of June, 1950, a copy of which said Order is hereto attached and identified as Exhibit *V*, and by reference made a part hereof, the same as though fully set out herein.

11. Petitioner further states that the evidence of record in the instant case does not support the findings as set out either in the Report and Order recommended by Examiner C. I. Kephart or by the Commission, Division 5, and that there was no evidence of record showing any need for service by C. L. Cunningham d/b/a Pemiscot Motor Freight Company between St. Louis, Missouri and Sikeston, Missouri. That the only witness appearing who testified with reference to the point of Sikeston was a representative of a milling company at Sikeston, Missouri, the substance of whose testimony is set out at Sheet No. 8 of the report of the Commission, Division 5, dated January 13, 1950, being Exhibit *III* attached hereto, which said summary and finding of the Commission is as follows:

> "A milling company at Sikeston, population 10,000, has utilized applicant's service from Memphis for a number of years in the movement of empty bags, with full satisfaction. While the purchases are frequent throughout the year, shipments by for-hire carriers do not occur every day, as the company operates 15 trucks of its own. It has not used the services of Memphis Transport Company or Gordon's Transport from Memphis to Sikeston and these carriers have never solicited its business."

12. Petitioner further states that in spite of the evidence of record in the instant case and of the Commission's cognizance of said evidence as more particularly set out in Paragraph 11 hereof, and further in spite of the various petitions and pleadings filed on behalf of your petitioner with the Interstate Commerce Commission calling said Commissioner's error to its attention the said Interstate Commerce Commission did on the 7th day of August, 1950 issue to C. L. Cunningham d/b/a Pemiscot Motor Freight Company, a certificate of public convenience and necessity, incorporating therein the matter hereinabove complained of.

13. Petitioner further states that the findings of the Commission and the issuance by it of a certificate of public convenience and necessity to C. L. Cunningham d/b/a Pemiscot Motor Freight Company, was unjust, arbitrary and unreasonable and without any basis in fact or law, for which said reason your petitioner states that certificate of public convenience and necessity so issued to the defendant is void and should be held to be of no force and effect, and should not confer upon said C. L. Cunningham d/b/a Pemiscot Motor Freight Company any authority to conduct motor common carrier operations.

14. Petitioner further states that it has exhausted all of its remedies before the Interstate Commerce Commission.

15. Petitioner further states that said Interstate Commerce Commission unjustly, arbitrarily and unreasonably, without any basis in fact or law, by its finding, as above, has deprived this petitioner of its rights, and of his property without compensation in violation of the provisions and guarantees of the Fifth Amendment to the Constitution of the United States, for which this petitioner has no redress or remedy at law. Petitioner further states that unless this Court grants an injunction as hereinafter prayed for, it will suffer irreparable loss, injury and damage.

WHEREFORE, petitioner prays:

1. That this Court issue its writ of subpoena directed to the defendants, United States of America, and Interstate Commerce Commission, requiring and commanding said defendants, and each of them, on a day certain therein to be specified, to be and appear before this Court and to answer this Bill;

2. That this Court direct that due and proper notice of this Bill and proceedings issue, and be served forthwith, as prescribed in Title 28 U. S. C. A., Section 2284, 62 Stat. 968, and Section 2321 through 2325 inclusive;

3. That this Court enter its order setting aside and annulling the Report and Order of the Commission in No. MC 105120, Sub No. 3 issued on the 13th day of January, 1950, copy of which same is attached hereto and identified as Exhibit No. 3.

4. That this Court make and enter its order setting aside and annulling the certificate of public convenience and necessity No. MC 105120 issued to C. L. Cunningham d/b/a Pemiscot Motor Freight Company, Caruthersville, Missouri, dated the 7th day of August A. D. 1950, and further that this Court find and hold that said certificate is null and void, and confers no authority upon said C. L. Cunningham d/b/a Pemiscot Motor Freight Company, insofar as the matters herein complained of are concerned;

5. That this Court upon final hearing issue an order upon the defendant Interstate Commerce Commission commanding said Interstate Commerce Commission to set aside its Report and Order in No. MC 105120, Sub No. 3, dated the 13th day of January A. D. 1950, and to revoke the certificate of public convenience and necessity No. MC 105120, dated the 7th day of August, A. D. 1950, and further that this Court find and hold that said certificate is null and void and confers no authority upon said C. L. Cunningham d/b/a Pemiscot Motor Freight Company insofar as the matters herein complained of are concerned;

6. That a temporary or interlocutory injunction be entered herein restraining, enjoining and suspending the enforcement of the Order of January 13, 1950 hereinabove referred to;

7. That petitioner have and recover from the defendant, and each of them, the costs of this suit;

7 8. That petitioner have such other, further and general relief as may be meet and proper in the premises.

Respectfully submitted,

B. W. TOURETTE,
GREGORY M. REBMAN,
Attorneys for Petitioner,
314 North Broadway,
St. Louis 2, Missouri.

Exhibit I to Complaint.

C-5.1-R

CORRECTED CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

No. MC 3062 *

L. A. TUCKER TRUCK LINES, INCORPORATED,
CAPE GIRARDEAU, MISSOURI.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 4th day of February, A. D. 1947

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

REGULAR ROUTES:

General commodities, except those of unusual value, and except dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

Between Cairo, Ill., and St. Louis, Mo., as follows:

From Cairo over Illinois Highway 3 to Red Bud, Ill., thence over Illinois Highway 159 to Belleville, Ill., thence

* This certificate constitutes the remainder of the operating rights granted to the above-named carrier in this proceeding, including the consolidations noted on the previous certificate, a portion of said operating rights having been trasferred to W. H. Elliott, doing business as Devers Truck Line, Docket No. MC 46270, pursuant to MC-F 2853, approved April 26, 1946.

over Illinois Highway 13 to East St. Louis, Ill., and thence across the Mississippi River to St. Louis;

Service is authorized to and from the intermediate points of McClure, Ill., and those between McClure and Cairo, without restriction; Chester and those between Chester and McClure, with the restriction that traffic moving to or from points north of Chester must move to, from, or through St. Louis, or through McClure; and intermediate points in St. Clair and Madison Counties, Ill., restricted against pick-up and delivery of uncrated furniture, except that at East St. Louis Belleville, Ill., the carrier may also pick-up shipments of uncrated furniture moving via St. Louis to the termini and interemdiate and off-route points specified herein, other than St. Louis and those in St. Clair
9 and Madison Counties; the off-route points of Delta, Diswood, Tammas, Unity, Sandusky, Miller City, and Elco, Ill., without restriction, those in St. Clair and Madison Counties restricted against pick-up and delivery of uncrated furniture, and the off-route points of Menard, Mill Creek, Alto Pass and Makanda, Ill., with the restriction that traffic moving to or from points north of Chester must move to, from, or through St. Louis, or through McClure.

From Cairo over U. S. Highway 51 to Carbondale, Ill., thence over Illinois Highway 13 to East St. Louis, Ill., and thence across the Mississippi River to St. Louis;

Service is authorized to and from the intermediate points of Pinkneyville, Ill., and those between Pinkneyville and Cairo, with the restriction that traffic moving to or from points north of Pinkneyville over the above-specified route must move to, from or through St. Louis; intermediate points in St. Clair and Madison Counties, Ill., restricted against pick-up and delivery of uncrated furniture except that at East St. Louis and Belleville, the carrier may also pick-up shipments of uncrated furniture moving via St. Louis to the termini and intermediate and off-route points specified herein other than St. Louis and those in St. Clair and Madison Counties; the off-route points of Delta, Diswood, Tamms, Unity, Sandusky, Miller City, Elco, Menard, Mill Creek, Alto Pass and Makanda, Ill., with the restriction that traffic moving to or from points north of Pinkneyville over the above-specified route must move to, from, or through St. Louis; and the off-route points in St. Clair and

Madison Counties, Ill., restricted against pick-up and delivery of uncrated furniture, and

Return over the above-specified routes to Cairo.

Between Mt. Vernon, Ill., and St. Louis, Mo.:

From Mt. Vernon over Illinois Highway 15 to East St. Louis, Ill., thence across the Mississippi River to St. Louis; and return over the same route to Mt. Vernon.
Service is authorized from the intermediate points of East St. Louis and Belleville, Ill., restricted to pick-up only of shipments moving via St. Louis to Mt. Vernon.

Between Pyatts, Ill., and Harrisburg, Ill., as follows:

From Pyatts over Illinois Highway 152 to Du Quoin, Ill., thence over U. S. Highway 51 to Carbondale, Ill., and thence over Illinois Highway 13 to Harrisburg;
From Pyatts to Du Quoin as specified above, thence over U. S. Highway 51 to junction Illinois Highway 14, thence over Illinois Highway 14 to Christopher, Ill., thence over Illinois Highway 148 to Plumfield, Ill., thence over Illinois Highway 149 to Thompsonville, Ill., and thence over Illinois Highway 34 to Harrisburg; and

Return over these routes to Pyatts.

Service is authorized to and from all intermediate points, and the off-route points of Orient, Herrin, Royalton, Carterville, Dowell, Cambria, Colp, Harco, and Hurst, Ill.

Between Vienna, Ill., and Evansville, Ind:

From Vienna over U. S. Highway 45 to Norris City, Ill., thence over Illinois Highway 1 to Crossville, Ill., thence over Illinois Highway 14 to the Illinois-Indiana State line, and thence over Indiana Highway 66 to Evansville, and return over the same route.
Service is authorized to and from all intermediate points.

Between points in Illinois, as follows:

From Olmsted over Illinois Highway 37 to junction U. S. Highway 51;
From Vienna over Illinois Highway 146 to Ware;
From Mt. Vernon over Illinois Highway 148 to Christopher;
From Mt. Vernon over Illinois Highway 37 to West Vienna;

From Mt. Vernon over Illinois Highway 142 to McLeansboro, Ill., thence over Illinois Highway 14 to Benton, Ill., and thence over Illinois Highway 34 to Thompsonville;
From Whittington over unnumbered highway to Ewing;
From Crab Orchard over unnumbered highway to Paulton;
From Marion over Illinois Highway 166 to New Burnside; and
Return over these routes to the above-specified origin points.

Service is authorized to and from all intermediate points.

General commodities, except those of unusual value, and except dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M. C. C. 467, unerated furniture, commodities, in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

Between National Stock Yards, Ill., and Cape Girardeau, Mo.:

From National Stock Yards, over city streets to U. S. Highway 67, thence over U. S. Highway 67 to junction U. S. Highway 61, and return over U. S. Highway 61 to Cape Girardeau, and return over the same route to National Stock Yards.
Service is authorized to and from the intermediate and off-route points of St. Louis, Luxemburg, Mattese, Mehlville, Arnold, Barnhart, Beck, Imperial, Pevely, Herculaneum, Festus, Crystal City, Bonne Terre, Desloge, St. Francois, Flat River, Leadwood, Elvins, Farmington, Mine La Motte, Fredericktown, Patton, Millersville, Jackson, DeSota, and Bismarck, Mo., and those in Madison and St. Clair Counties, Ill.

Between McClure, Ill., and Cape Girardeau, Mo.:

From McClure over Illinois Highway 146 to the Missouri-Illinois State line, and thence across the Mississippi River to Cape Girardeau; and return over the same route to McClure.
Service is not authorized to or from intermediate points.

Between Cape Girardeau, Mo., and Sikeston, Mo.:

From Cape Girardeau over U. S. Highway 61 to Sikeston, and return over the same route.

Service is authorized to and from the intermediate and off-route points of Anchell, Illmo, Fornfelt, Kelso, and Benton, Mo.

Between Cape Girardeau, Mo., and Charleston, Mo., as follows:

From Cape Girardeau over Missouri Highway 74 to junction Missouri Highway 25, thence over Missouri Highway 25 to Delta, Mo., and return over Missouri Highway 25 to junction Missouri Highway 55, thence over Missouri Highway 55 to junction U. S. Highway 61, thence over U. S. Highway 61 to junction U. S. Highway 60, thence over U. S. Highway 60 to Charleston; and

Return from Charleston over U. S. Highway 60 to junction Missouri Highway 55, thence over Missouri Highway 55 to Benton, Mo., and thence over U. S. Highway 61 to Cape Girardeau.

Service is authorized to and from the intermediate and off-route points of Dutchtown, Delta, Oran, and Chaffee, Mo.

Between Jackson, Mo., and Dutchtown, Mo.:

From Jackson over Missouri Highway 25 to Dutchtown, and return over the same route.

Service is authorized to and from the intermediate and off-route points of Gordanville and Whitewater, Mo.

IRREGULAR ROUTES:

Household goods,

Between points and places in that part of Missouri bounded by a line beginning at the Mississippi River and extending along Missouri Highway 34, to Lutesville, Mo., thence along Missouri Highway 91 to Advance, Mo., thence along Missouri Highway 25 to Dexter, Mo., thence along U. S. Highway 60 to the Mississippi River, and thence along the west bank of the Mississippi River to point of beginning, including points and places on the indicated portions of the highways specified, on the one hand, and, on the other, points and places in Illinois on and south of Illinois High-

12 way 10.

Livestock,

Between St. Louis, Mo., and National Stock Yards, Ill., on the one hand, and, on the other, Cape Girardeau, Mo., and points and places in Missouri within 18 miles of Cape Girardeau.

IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

AND IT IS FURTHER ORDERED, That this certificate shall supersede the certificate issued in this proceeding on July 24, 1942, which is hereby canceled to the extent authorized herein; a portion of said operating rights having been duly transferred to W. H. Elliott doing business as Devers Truck Line, Docket No. MC 46270, as set forth in the footnote appended hereto.

By the Commission, division 5.

W. P. BARTEL,
(Seal) Secretary.

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13 **Exhibit IA to Complaint.**

C-15.1

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

No. MC 3062 Sub 5

L. A. TUCKER TRUCK LINES, INCORPORATED,
CAPE GIRARDEAU, MISSOURI.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 25th day of November, A. D., 1947

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding:

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

General commodities, except those of unusual value, dangerous explosives, uncrated furniture, household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M. C. C. 467, commodities in bulk, and those requiring special equipment over regular routes,

Between Cairo, Ill., and Charleston, Mo.:

From Cairo over U. S. Highway 51 to junction U. S. Highway 60, thence over U. S. Highway 60 to Charleston, and return over the same route.
Service is not authorized to or from intermediate points.

Between Sikeston, Mo., and Portageville, Mo.:

From Sikeston over U. S. Highway 61 to Portageville, and return over the same route.
Service is authorized to and from the intermediate and off-route points of Matthews, Noxall, New Madrid, Marston, Kewanee, Lilbourn, and Canalou, Mo.

Between Charleston, Mo., and East Prairie, Mo.:

From Charleston over Missouri Highway 55 to East Prairie, and return over the same route.
Service is not authorized to or from intermediate points.

Between Sikeston, Mo., and Essex, Mo.:

From Sikeston over U. S. Highway 60 to Essex and return over the same route.

14 No. MC 3062 Sub 5, Sheet No. 2

Service is authorized to and from the intermediate point of Morehouse, Mo.

General commodities, except those of unusual value, dangerous explosives, uncrated furniture, household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M. C. C. 467, commodities in bulk, and those requiring special equipment,

Service is authorized to and from Bertrand, Mo., as an intermediate point in connection with said carrier's presently authorized regular route between Sikeston and Charleston, Mo.

AND IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

(Seal)

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15 **Exhibit IB to Complaint.**

C-15.1

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

No. MC 3062 Sub 6

L. A. TUCKER TRUCK LINES, INCORPORATED,
CAPE GIRARDEAU, MISSOURI

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 28th day of June A. D., 1950

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

General commodities, except those of unusual value, and except dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467, uncrated furniture, commodities in bulk, and

commodities requiring special equipment, over regular routes, Between Portageville, Mo., and Blytheville, Ark.:

From Portageville over U. S. Highway 61 to Blytheville,
Between Hayti, Mo., and Caruthersville, Mo.:
From Hayti over Missouri Highway 84 to Caruthersville.
Return over these routes.
Service is authorized to and from all intermediate points.

AND IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

(Seal)

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16 **Exhibit II to Complaint.**

INTERSTATE COMMERCE COMMISSION, JUN 20 1949

Served

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, Interstate Commerce Commission, Washington, D. C., and served on all other parties in interest, within 20 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 10 days after the final date for filing exceptions.

Any new operation to be authorized by the recommended order herein if it becomes effective may not be commenced until such time as the certificate has actually been issued. The certificate will not be issued until the applicant has complied with the provisions of the Interstate Commerce Act and the requirements of the Commission thereunder. It should not be assumed that the recommended order has become effective as the order of the Com-

mission until a notice to that effect, signed by the Secretary of the Commission, has been received.

No. MC-105120 (Sub-No. 3)

C. L. CUNNINGHAM EXTENSIONS—MISSOURI AND OTHER STATES

Submitted Decided

Public convenience and necessity found to require operation by applicant in interstate or foreign commerce as a common carrier by motor vehicle of general commodities, with exceptions, over regular routes in lieu of irregular-route operation between the St. Louis, Mo.-East St. Louis, Ill., commercial zone, Cairo, Ill., and Memphis, Tenn., respectively, on the one hand, and points in specified counties in southeastern Missouri, on the other. Issuance of a certificate approved upon compliance by applicant with certain conditions and application in all other respects denied.

John S. Mosby for applicant.

E. J. Daman, B. W. LaTourette, V. E. Smart, and *E. C. Dodge* for protestants and interveners in opposition to the application.

17 REPORT AND ORDER

RECOMMENDED BY C. I. KEPHART, EXAMINER

By application filed August 17, 1948, as amended, C. L. Cunningham, doing business as Pemiscot Motor Freight Co., of Caruthersville, Mo., seeks a certificate of public convenience and necessity authorizing extensions of operation, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, with exceptions named later, (1) between East St. Louis, Ill., and Cairo, Ill., (2) between Chester, Ill., and junction of Missouri Highway 55 and U. S. Highway 61 in Missouri, (3) between McClure, Ill., and Blytheville, Ark., (4) between Cairo, Ill., and Missouri-Arkansas State line, and (5) between Sikeston, Mo., and Memphis, Tenn., all over routes specified in the appendix hereto, with service at intermediate and off-route points as designated, but without direct or through service between St. Louis and Memphis.

The application was referred to the examiner for hearing and the recommendation of a suitable order thereon. Hearing was held at St. Louis, Mo., on January 27, 1949. St. Louis-San Fran-

cisco Railway Company, as protestant, and Frisco Transportation Company, L. A. Tucker Truck Lines, Viking Freight Company, Memphis Transportation, Inc., Righter Trucking Company, Gordon Transports, Inc., Superior Forwarding Company, Walsh Freight Lines, Hogan Truck Lines, Kimbel Lines, Inc., and Memphis Transports, Inc., as interveners, oppose the granting of the application.

Applicant has been engaged in intrastate motor-vehicle transportation since 1944 and in interstate operation since January, 1945, when he was authorized to operate as a common carrier by motor vehicle between St. Louis, Mo.-East St. Louis, Ill., commercial zone, as defined in 1 M. C. C. 656 and 2 M. C. C. 285, on the one hand, and points in Pemiscot County, Mo., and Portageville, Mo., on the other, over irregular routes. In April, 1946, he was granted an extension to operate between Cairo, on the one hand, and points in Pemiscot County and Portageville, Conran, Marston, Lilbourn, Risco, Parma, Catron, New Madrid, Kewanee, Matthews, Kennett, Caruth, Senath, Arbyrd, Cardwell, and Hornersville, Mo., on the other, over irregular routes; and in January, 1947, he was authorized additionally to operate between Memphis, on the one hand, and points in Pemiscot County and Portageville and Sikeston, on the other, over irregular routes. He operates 9 trucks and 8 tractor-trailer units and maintains terminals at St. Louis, Cairo, and Memphis.

In addition to the new regular-route authority sought in this application, applicant requests permission to change the status of all of his present operations from that of an irregular-route carrier to that of a regular-route carrier over the indicated routes with the right to serve presently-authorized points not located on those routes as off-route points. Except for points in the St. Louis area and Sikeston, which is in Scott County, all of the Missouri points named are situated in Pemiscot, New Madrid, and Dunklin Counties, in the southeastern corner of the State. Despite applicant's plans originally to operate as an irregular-route carrier under the certificates issued to him, the cessation of operation by another carrier combined with the demands of the shippers in the territory served have required him to provide overnight service and daily delivery over certain regular routes as the most direct and feasible; hence his request for change of status so that the certificates may conform to the character of service required and violations of the Commission's rules and regulations under the Interstate Commerce Act may be avoided.

Route (1) sought here, i.e., between East St. Louis and Cairo on the easterly side of the Mississippi River, without service at intermediate points or between those 2 termini, would be used alternatively with routes on the Missouri side of the river now followed for intrastate traffic for the movement of freight between

points in the St. Louis-East St. Louis commercial zone and points beyond Cairo, mainly in southeastern Missouri.

Route (2) would be a segment of another alternative route between the St. Louis-East St. Louis commercial zone and Sikeston and points beyond, without service at any point on this segment and solely for operating convenience. Likewise, on the proposed route (3) between McClure and Blytheville, no points intermediate to the St. Louis-East St. Louis commercial zone and Sikeston would be served, but all points southward from and including Sikeston and various off-route points would be served.

On route (4) all points southwestward from and including Sikeston and various specified off-route points would be served; and on route (5) Sikeston, Portageville, and all points in Pemiscot County, whether on or off route, would continue to be served.

Traffic now moved by applicant between St. Louis proper and southeastern Missouri points is intrastate in character, but, if hauled over the proposed route or routes east of the river, it would become interstate traffic. In the application, many additional points in that region also are desired to be served over regular interstate routes from St. Louis, namely, Sikeston and some of those now served from Cairo[1] and Canalou, Laforge, Gideon, and Blytheville. However, applicant moved to expand the application to include authority for service from St. Louis to all points in Dunklin County that he now is authorized to serve from Cairo, which would embrace the additional points of Kennett, Caruth, Senath, Arbyrd, and Cardwell as well as Hornersville already named, which is substantially all of the southern part of the county, and the new points of Clarkton and Holcomb also named in the application. Interveners vigorously object to such amendment as introducing unnecessary competition with other carriers not represented at the hearing. The motion tentatively was granted, for consideration on the record. Additional points that would be served from Cairo are Sikeston, Gideon, and Blytheville and from Memphis they are Conran, Marston, Lilbourn,
Risco, Parma, Catron, New Madrid, Kewanee, Matthews,
19 Canalou, Loforge, and Gideon. Some are small places, without direct service, in which a general store or commissary may be the principal receiver of shipments. A number are off these routes. Livestock would be hauled from all of this territory to the East St. Louis stockyards. Restrictions to prohibit the movement of through traffic between St. Louis and Memphis are acceptable to applicant, as stated in the application, but not to prohibit his movement of traffic between Cairo and Memphis.

In support of applicant's request for change of status to that

[1] Conran, Marston, Lilbourn, Risco, Parma, Catron, Kewanee, and Matthews.

of regular-route operation, he introduced approximately 20,000 shipping documents covering deliveries performed by him during the last 6 months of 1948. The demands of the shippers and receivers of freight and the distance and convenience of operation have tended to standardize his operations in this manner. Reliance on irregular demands and deliveries is said to have been found inadequate and unsatisfactory. Counsel for interveners contends that information of this kind is not satisfactory evidence in proof of public convenience and necessity for such a change, to which applicant responds that no rule of the Commission requires the withholding of evidence of regularity and frequency of his service so as to avoid his becoming a regular-route common carrier.

Ten witnesses in addition to applicant testified in support of the application. The first, a business man of Portageville, has used applicant's service regularly 6 days per week for the movement of traffic from St. Louis, Cairo, and Memphis and it has been wholly satisfactory. Formerly, another motor carrier performed regular-route service; upon his discontinuance of operation, applicant was called upon to provide this transportation, which is overnight in time of delivery. Approximately 50 percent of his shipments originate at St. Louis and points east, north, or west, 25 percent at Cairo, and 25 percent at Memphis. The volume equals about one ton per day. At times in the past he has utilized L. A. Tucker Freight Lines, Frisco Transportation Company, and St. Louis-San Francisco Railway Company for shipments that originated at St. Louis and points beyond. He was not informed regarding other carriers than applicant that now operate to and from Cairo or Memphis.

The next witness from Portageville, whose population is 3,000, was its mayor, a dealer in farm equipment, who has found applicant's service to be adequate and satisfactory during the past 3 years. For approximately 2 years the service has been performed daily. He also uses L. A. Tucker Freight Lines at times. Much of the equipment is transported by railroad to distribution points, such as St. Louis, or other railway stations, whence it is delivered by Frisco Transportation Company or is called for by the consignee. He desires the continuance of applicant's service as now performed along with that of other carriers.

A dealer in general hardware, furniture, and farm implements at Steele, in Pemiscot County, population 2,250, has used applicant's service from its commencement and desires the continuance of daily deliveries from St. Louis, Cairo, and Memphis in the interest of his business. His shipments equal about 20 tons per month. He knows of no other motor carrier that operates to and from Cairo and is not well informed regarding others that operate to and from St. Louis or Memphis.

A wholesale dealer in automobile parts and equipment at Caruthersville, Pemiscot County, population 11,000, has used applicant's service daily for a number of years and has found it to be adequate and satisfactory. Apparently, only, one or two other motor carriers serve this city. Continuance of the present service by applicant is urged.

The next witness is engaged in the hardware and farm implement business at New Madrid, in the county of that name. Its population equals about 3,000. Since the cessation of operation by another carrier, he has used applicant's service regularly, mainly from St. Louis and Cairo, and has found it to be adequate and satisfactory. He desires its continuance. Apparently, several other motor carriers serve New Madrid, one of which has hauled shipments for him frequently and another occasionally. Their service is said to be slower than that performed by applicant.

Another witness engaged in the hardware and farm implement business at Parma, population 1,500, and New Madrid, both in the same county, has been served regularly by applicant at both places of business, mainly in connection with shipments from St. Louis, Cairo, Paducha, Ky., Evansville, Ind., and points beyond. His shipments arrive 2 or 3 times per week. The service has been satisfactory and its continuance is urged. Parma now is served only by the Frisco system and applicant.

A retail furniture dealer at Gideon, population 2,000, on the St. Louis-San Francisco and St. Louis Southwestern railways in New Madrid County has no motor-carrier service whatever. Rail service is said to be too slow. That proposed by applicant is stated to be needed, should prove to be adequate, and its authorization is urged. The witness now uses his own truck for such haulage from stations or other places except where it is performed as a part of the railroad service.

A dealer in hardware and drygoods at Gideon testified to substantially the same effect and the service proposed by applicant is desired. Less-than-carload shipments are received from various points east and north practically every day. Occasionally, truck shipments are consigned to him at Malden, Mo., 11 miles distant, where he calls for them with his own truck.

A hardware dealer at Blytheville, population 15,000, receives shipments mainly from St. Louis and Memphis and points beyond, frequently by means of motor carriers. The service from Memphis has been satisfactory, but that from northerly points has been inadequate. The service proposed by applicant, it is urged, should greatly improve the situation in that respect. Service from St. Louis now is performed by 2 railroads, their motor-carrier affiliates, and 2 or 3 other motor carriers.

A witness from Sikeston, population 10,000, is engaged in the milling business and has utilized applicant's service from Mem-

phis for a number of years in the movement of empty bags, with full satisfaction. While the purchases are frequent throughout the year, shipments do not occur every day, as the company
21 operates 15 privately-owned trucks itself. This city is served by several other motor carriers, most of whom also handle shipments for this industry; also, less-than-carload shipments arrive periodically by railroad.

Protestant St. Louis-San Francisco Railway Company operates extensively throughout eastern Missouri and Arkansas. Among the stations on its St. Louis-Memphis line are Sikeston, Kewanee, Lilbourn, Marston, Conran, Portageville, Steele, and Blytheville, which are involved here. Caruthersville is the terminus of a branch line from Poplar Bluff, Mo., through Kennett and Hayti, Mo. Parma, Risco, Gideon, and Kennett are on a more westerly line from St. Louis. New Madrid is the easterly terminus of a branch line of the St. Louis Southwestern railway from Malden through Lilbourn. This company's main line southward from St. Louis crosses that of the St. Louis-San Francisco at Gideon. The latter operates 2 local freight trains each way daily between St. Louis and Memphis, serving the points on its line named. The trains are not loaded to capacity and additional tonnage could be handled without impairing the present service, as shown by the performance data introduced. One freight station at St. Louis handles traffic that comes in or goes out of that city; the other handles traffic transferred between carriers there, for delivery at points beyond. Collection and delivery is provided at all other agency stations.

Frisco Transportation Company is a motor-carrier affiliate of the foregoing railway and performs substitute service throughout this territory. All traffic handled by it is subject to a prior or subsequent rail haul, coordinated with the motor operation. Service is provided daily except Sundays. Breakbulk points on the railroad for traffic moved from or through St. Louis are Chaffee, Sikeston, and Hayti, Mo., and Blytheville, whence distribution is made by this affiliate to most of the points involved, as explained on the record.

Intervener Kimbel Lines, Inc., operates daily between St. Louis and Memphis via Sikeston and Blytheville and serves Caruthersville as an off-route point, among other rights. Its routes southward from St. Louis on each side of the Mississippi River converge at Cape Girardeau, Mo. Its equipment comprises 46 trucks, 55 tractors, and 80 semitrailers and it maintains terminals at the above termini. From 8 to 10 vehicles move in each direction daily except Sundays. The volume of traffic obtainable at Sikeston, Caruthersville, and Blytheville is said not to justify the maintenance of agencies there, but the business is solicited and, if increased service should become necessary, this carrier is ready and willing

to provide it. Up to 10 or more trucks are said now to be idle most of the time and it is urged that no need exists for the service proposed by applicant.

Viking Freight Company, of St. Louis, maintains regular schedules of daily operation as a motor common carrier of general commodities, with exceptions, between St. Louis and Cairo, Memphis and Cairo, and St. Louis and Memphis, the first 2 of which hauls are overnight service. Several other motor carriers also are authorized to perform similar transportation. The only intermediate point with which it is concerned here is Cairo, as it does not serve any of the Missouri points named here. It operates 28 trucks, 208 tractors, and 248 trailers. It has heard of no complaints about its service.

22 Walsh Freight Lines, of St. Louis, which recently acquired certain common-carrier rights from Robertson Truck Lines, Inc., in No. MC-FC-28936, operates between St. Louis and Paragould, Ark., and points beyond to Memphis over U. S. Highway 3 from St. Louis to Ware, Ill., thence Illinois Highway 146 to the Mississippi River and across the river to Cape Girardeau, thence U. S. Highway 61 to Sikeston, thence over U. S. Highway 60 to Dexter, Mo., and thence over Missouri and Arkansas Highway 25 to Paragould. All intermediate points between Dexter and the State line, including Clarkton, Holcomb, Kennett, Caruth, Senath, Arbyrd, and Cardwell, are served. Blytheville is not reached. It operates 14 tractor-trailer units. Daily overnight service is provided. This territory also is served by another motor carrier and no need for applicant's service is said to exist.

L. A. Tucker Truck Lines, of Cape Girardeau, provides daily overnight service between St. Louis and Cairo and daily service between Cairo and points on U. S. Highway 61 from Sikeston to Portageville inclusive and several off-route points, mainly Marston, Lilbourn, New Madrid, Matthews, and Canalou. These points also are served by it direct from St. Louis. It operates 14 trucks, 26 tractors, and 32 trailers and maintains terminals at Cairo, Sikeston, and New Madrid and telephone connection at Portageville. Some of its equipment now is idle and additional tonnage could be handled readily. In view of the competition that now prevails, no need for the proposed service is said to exist, although applicant would continue under this application to perform mainly the service that he now offers.

Memphis Transports, Inc., of Memphis, a motor common carrier, operates between St. Louis and Memphis, from St. Louis to East St. Louis, thence Illinois Highway 3 to McClure and Illinois Highway 146 to Cape Girardeau, thence U. S. Highway 61 to West Memphis, and across the river to Memphis, serving all intermediate points, including those specified herein. Terminals are maintained at the termini named and daily overnight service with 5

schedules is provided. Another regular-route carrier, such as applicant, would create additional competition, which this carrier believes not to be necessary.

Gordon's Transport, Inc., of Memphis, also operates as a motor common carrier between the St. Louis-East St. Louis commercial zone and Memphis over connected segments of Illinois Highways 13, 159, 3, and 146 from St. Louis to and across the Mississippi River to Cape Girardeau and over Missouri Highway 74 to junction with U. S. Highway 61 and thence over the last-named highway to Memphis. It is authorized to serve Sikeston and all other intermediate points in Missouri and Arkansas thence to Memphis. The time of the run between St. Louis and Memphis is 9.5 to 10 hours. Daily through service is provided, with 2 runs one night and 3 runs the next night. The volume of traffic available at the points involved is said to be light and another regular-route carrier would increase the competition for it. This carrier suspended operation because of a strike in 1945 and resumed service on November 15, 1948. Sikeston and Blytheville are the only intermediate points served during the first 2 months after that date.

23 A. L. Hogan, doing business as Hogan Truck Line, of Kennett, is authorized as a motor common carrier to operate between St. Louis and Memphis over segments of Illinois Highways 13, 159, and 3 to Chester, Ill., thence Missouri Highways 51 and 25 to Kennett, thence Missouri Highway 84 to Hayti, and thence U. S. Highway 61 to Memphis, serving the intermediate and off-route points of Clarkson, Holcomb, Kennett, Caruth, Senath, Arbyrd, Cardwell, and Hornersville. Terminals are maintained at St. Louis, Kennett, and Memphis. One tractor-trailer unit is operated each way per night. He contends that the proposed regular-route operation would result in greater competition with him than the present irregular-route service and would be detrimental to him.

Superior Forwarding Company, of St. Louis, is a common carrier operating over both Missouri and Illinois routes between St. Louis and Blytheville and numerous other Arkansas points, chiefly Little Rock, over U. S. Highway 61 for a part of the distance. It utilizes 7 or 8 trucks, 30 tractors, and 25 semi-trailers and maintains terminals at St. Louis and 4 points in Arkansas. It operates from 8 to 14 runs per day over its main and branch routes. Service at Blytheville is not regular but as the movement of traffic to or from that point requires, perhaps once or twice per week.

Discussion and Conclusion

If the application be approved, applicant would establish terminals at or near Sikeston and at Blytheville and would continue

and improve the regular overnight service that he now performs to and from all of the points in southeastern Missouri and northeastern Arkansas embraced herein.

Under applicant's present operations, he may follow routes on either side of the Mississippi River between the St. Louis-East St. Louis commercial zone and certain destinations in southeastern Missouri. Upon the cessation of operation by another common carrier several years ago, he gained some of the traffic formerly transported by that carrier and altogether regular overnight service seems to have been a natual evolution of his operations. No traffic would be hauled between St. Louis and Cairo proper. Under the circumstances, the proposed change of status from irregular-route operation to regular-route operation would not markedly alter the present competitive situation, except to some extent from and to St. Louis, and it should be approved. This recommendation embraces routes (1), (2), parts of routes (3) and (4), and route (5) in the appendix.

Applicant already serves most of the points in New Madrid and Pemiscot Counties and the southerly part of Dunklin County from Cairo. The question here is that as whether his destination territory should be enlarged to include all points in New Madrid and Pemiscot Counties, most of those in Dunklin County, and Blytheville from and to Cairo and also the St. Louis-East St. Louis commercial zone over the routes described.

With respect to proposed route (3) in the appendix, the additional rights from and to the St. Louis-East St. Louis area would embrace all points in New Madrid County other than Portageville, which now is served, and an extension of 4 miles along
24 U. S. Highway 61 to Blytheville, a city of 15,000 population; but by route (4) through Cairo all points in New Madrid County and, in addition, those in Pemiscot and most of Dunklin Counties would be served.

The record indicates that *Gideon*, in New Madrid County, now is inadequately served, but no evidence was introduced regarding the situation at *Clarkton* and *Holcomb*, in northerly Dunklin County, except that they are served at present by intervener Walsh Freight Lines. Gideon is located on a county road about 3 miles east of Clarkton and about 15 miles west of Portageville. It should be served by the carrier that now serves Clarkton. With 2 railroads, their motor-carrier affiliates, and 2 or 3 other motor carriers, *Blytheville* apparently possesses adequate transport facilities. Under the circumstances, the application with respect to these 4 points should be denied.

In the interest of the transportation of livestock to East St. Louis as well as of general commodities on return trips, the record justifies the enlargement of applicant's operating rights between points in the St. Louis-East St. Louis area and Cairo respectively,

on the one hand, and *Sikeston* and *all points in New Madrid and Pemiscot Counties and in Dunklin* County on and south of Missouri Highways 84 and 90 over the routes or parts of routes Nos. (1) to (4) described in the appendix, on the other.

Accordingly, the examiner finds that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, except articles of unusual value, dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467, articles requiring special equipment, commodities in bulk, and those injurious or contaminating to other lading, between the points and over the routes described below:

(1) Between East St. Louis, Ill., and Cairo, Ill., over Illinois Highway 3 via Red Bud, Ill., (also from East St. Louis over Illinois Highway 13 to Belleville, Ill., and thence over Illinois Highway 159 to Red Bud and thence as specified above to Cairo) and return over either route, serving points in the St. Louis, Mo.-East St. Louis commercial zone, as defined by the Commission, as intermediate or off-route points; *with service at the intermediate points of* CHESTER *and* MCCLURE, ILL., *and the terminus of Cairo restricted to joinder only with routes 2, 3, and 4 below.*

(2) Between Chester, Ill., and junction of Missouri Highway 55 and U. S. Highway 61, from Chester across the Mississippi River and over Missouri Highway 51 to Perryville, Mo., thence over Missouri Highway 25 to Jackson, Mo., and thence over Missouri Highway 35 to junction with U. S. Highway 61 near Morley, Mo., and return over the same route, serving no intermediate points; with service at the termini restricted to joinder only.

25 (3) Between McClure, Ill., and junction of U. S. Highway 61 and Missouri-Arkansas State line, from McClure over Illinois Highway 146 to and thence across the Mississippi River to Cape Girardeau, Mo., thence over Missouri Highway 74 to junction with U. S. Highway 61, and thence over U. S. Highway 61 to the said State line and return over the same route, *serving Sikeston, Mo., and all points on U. S. Highway 61 south thereof, as intermediate points and all other points in New Madrid and Pemiscot Counties, Mo.*, as off-route points; with service at McClure restricted to joinder only.

(4) Between Cairo, Ill., and junction of Missouri Highway 25 and Missouri-Arkansas State line, from Cairo over U. S. Highway 60 to Sikeston, Mo., thence over U. S. Highway 61 to Hayti, Mo., thence over Missouri Highway 84 to Kennett,

Mo., and thence over Missouri Highway 25 to the said State line and return over the same route, serving *Sikeston*, points in New Madrid and Pemiscot Counties, and those located in Dunklin County on and south of Missouri Highways 84 and 90 as intermediate or off-route points.

(5) Between Sikeston, Mo., and Memphis, Tenn., over U. S. Highway 61, serving Portageville, Mo., as an intermediate point and points in Pemiscot County, Mo., as intermediate or off-route points.

Restriction applicable to all routes:

No service to be performed between the St. Louis-East St. Louis commercial zone and Memphis by any combination of routes authorized herein.

The examiner further finds that applicant is fit, willing and able properly to perform such service and to conform to the provisions of the Interstate Commerce Act and the Commission's rules and regulations thereunder, that a certificate authorizing such operations should be granted upon the return by applicant of his present certificate or certificates with request for cancelation of same, and that the application in all other respects should be denied.

It is recommended that the appended order be entered.

By C. I. Kephart, Examiner.

(Signature) C. I. KEPHART.

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APPENDIX

ROUTES SOUGHT

(1) Between East St. Louis and Cairo, Ill., from East St. Louis over Illinois Highway 3 to Cairo and alternatively from East St. Louis over Illinois Highway 13 to Belleville, Ill., and thence over Illinois Highway 159 to Red Bud, Ill., and return over the same route or routes, serving all points in the St. Louis, Mo.,-East St. Louis, Ill., commercial zone, as defined in 1 M. C. C. 656 and 2 M. C. C. 285, as intermediate or off-route points, for operating convenience, without service at other intermediate points or Cairo and in connection with routes 2 to 4 below, inclusive.

(2) Between Chester, Ill., and junction of Missouri Highway 55 and U. S. Highway 61, from Chester across Mississippi River and over Missouri Highway 51 to Perryville, Mo., thence over Missouri Highway 25 to Jackson, Mo., and thence over Missouri Highway 55 to junction with U. S. Highway 61 near Morley, Mo., and return over the same highways, for operating convenience only, serving no points on this segment of route.

(3) Between McClure, Ill., and Blytheville, Ark., from McClure over Illinois 146 to and across the Mississippi River to Cape Girardeau, Mo., thence over Missouri Highway 74 to junction with U. S. Highway 61, and thence over the last-named highway to Blytheville and return over the same route, serving Sikeston, Mo., and all points on U. S. Highway 61 south thereof and all other points in New Madrid and Pemiscot Counties, Mo., as off-route points.

(4) Between Cairo, Ill., and Missouri-Arkansas State line, from Cairo over U. S. Highway 60 to Sikeston, Mo., thence over U. S. highway 61 to Hayti, Mo., thence over U. S. Highway 84 to Kennett, Mo., and thence over Missouri Highway 25 to Missouri-Arkansas State line and return over the same route, serving Sikeston, all points in New Madrid and Pemiscot Counties as intermediate or off-route points, the off-route points of Clarkton and Holcomb, Mo., and all points in Dunklin County, Mo., on and south of Missouri Highways 84 and 90 as intermediate or off-route points; also, as amended, serving all of these points from and to the St. Louis-East St. Louis commercial zone over the foregoing routes.

(5) Between Sikeston, Mo., and Memphis, Tenn., over U. S. Highway 61, serving Sikeston and Portageville, Mo., and Memphis and all other points in Pemiscot County, Mo., as intermediate or off-route points.

No service between the St. Louis-East St. Louis commercial zone and Memphis to be performed by any combination of authorized routes.

27 Recommended by C. I. Kephart,
Examiner.

(Signature) C. I. KEPHART.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the day of A. D. 1949.

No. MC-105120 (Sub-No. 3)

C. L. CUNNINGHAM EXTENSIONS—MISSOURI AND OTHER STATES

Investigation of the matters and things involved in this proceeding having been made; said application, upon due notice, having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby made a part hereof; and said proceeding having been duly submitted;

It is ordered, That upon full compliance with the requirements of Sections 215 and 217 of the Interstate Commerce Act and with our rules and regulations thereunder, a certificate be issued to applicant authorizing operation in interstate or foreign commerce as a common carrier by motor vehicle of the commodities named and in the manner described in the findings in said report.

It is further ordered, That the application in all other respects be, and it is hereby, denied.

And it is further ordered, That this order shall be effective on .

By the Commission, Division 5:

W. P. BARTEL,
(Seal) Secretary.

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28 **Exhibit III to Complaint.**

This report will not be printed in full in the permanent series of Motor Carrier Reports of the Commission.

INTERSTATE COMMERCE COMMISSION

Mailed 1/16/50 Received 1/18/50

No. MC-105120 (Sub-No. 3) [1]

C. L. CUNNINGHAM EXTENSIONS—MISSOURI AND OTHER STATES

Submitted September 7, 1949. *Decided January 13, 1950.*

In Nos. MC-105120 (Sub-No. 3) and MC-105120 (Sub-No. 4), public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle of general commodities, with exceptions, over specified routes, between certain points in Missouri and Illinois and Memphis, Tenn., serving specified intermediate and off-route points, subject to conditions. Issuance of a certificate approved upon compliance by applicant with certain conditions and applications in all other respects denied.

John S. Mosby for applicant.

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[1] This report also embraces No. MC-105120 (Sub-No. 4), C. L. Cunningham Extension—New Madrid, Mo.

E. J. Damon, B. W. LaTourette, V. E. Smart, and *E. C. Dodge* for protestants and interveners in opposition to the application in No. MC-105120 (Sub-No. 3).

V. E. Smart, Ned Stewart, Charles Hudson, Jr., and *G. M. Rebman* for interveners in opposition to the application in No. MC-105120 (Sub-No. 4).

REPORT OF THE COMMISSION

DIVISION 5, COMMISSIONERS LEE, ROGERS, AND PATTERSON BY DIVISION 5:

These applications were heard separately and were the subject of separate reports and recommended orders. As the applications are related they will be disposed of in a single report. Joint exceptions to the recommended order of the examiner in the title proceeding were filed by numerous interveners. The recommended order of the joint board in No. MC-105120 (Sub-No. 4) was stayed by us. Our conclusions differ somewhat from those recommended.

29 By application No. MC-105120 (Sub-No. 3), filed August 17, 1948, as amended, C. L. Cunningham, doing business as Pemiscot Motor Freight Co., of Caruthersville, Mo., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, with exceptions named later herein, (1) between East St. Louis, Ill., and Cairo, Ill., (2) between Chester, Ill., and junction of Missouri Highway 55 and U. S. Highway 61 near Morley, Mo., (3) between McClure, Ill., and Blytheville, Ark., (4) between Cairo, Ill., and the Missouri-Arkansas State line, and (5) between Sikeston, Mo., and Memphis, Tenn., over the regular routes described in appendix A hereto, with service at the intermediate and off-route points designated, but without direct or through service between St. Louis and Memphis. St. Louis-San Francisco Railway Company, Frisco Transportation Company, L. A. Tucker Truck Lines, Viking Freight Company, Memphis Transportation, Inc., Righter Trucking Company, Gordon Transports, Inc., Superior Forwarding Company, Walsh Freight Lines, Hogan Truck Lines, Kimbel Lines, Inc., and Memphis Transports, Inc., oppose the granting of this application.

By application No. MC-105120 (Sub-No. 4), filed April 27, 1949, as amended, the same applicant seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, with exceptions named later herein, between New Madrid, Mo., and Memphis, over U. S. Highway 61, serving Marston and Conran, Mo., as intermediate points and Kewanee,

Matthews, Lilbourn, Catron, Parma, Risco, Gideon, and Campbell, Mo., as off-route points. Upon stipulation by applicant that no service would be performed over this route between Memphis and points in the St. Louis, Mo.-East St. Louis, Ill., commercial zone and beyond, the intervening motor common carriers withdrew their opposition thereto.

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Applicant has been engaged in intrastate operation since 1944 and in interstate operation since January 1945. He holds intrastate authority to operate between St. Louis and points in a portion of the area in southeastern Missouri embraced in the title application. He holds certificates in No. MC-105120 and in two sub-numbered proceedings authorizing respectively operation as a common carrier by motor vehicle, in interstate or foreign commerce, over irregular routes, of general commodities, except articles of unusual value, dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467, petroleum products, in bulk, and commodities requiring special equipment, (1) between points in the St. Louis, Mo.-East St. Louis, Ill., commercial zone as defined by this Commission, on the one hand, and on the other, points in Pemiscot County, Mo., and Portageville, Mo., (2) between Cairo, on the one hand, and on the other, points in Pemiscot County and Portageville, Conran, Marston, Lilbourn, Risco, Parma, Catron, New Madrid, Kewanee, Matthews, Kennett, Caruth, Senath, Arbyrd, Cardwell, and Hornersville, Mo., and (3) between Memphis, on the one hand, and points in Pemiscot County and Portageville and Sikeston, on the other, limited to service between the points so designated only. He operates 9 trucks and 8 tractor-trailer units and maintains terminals at St. Louis, Cairo, and Memphis.

No. MC-105120 (Sub-No. 3)—By this application, authority is sought by applicant in the main to change the status of all of his presently authorized operations from that of an irregular-

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route carrier to that of a regular-route carrier over the indicated routes with the right to serve presently-authorized points not located on those routes as off-route points. Except for points in the St. Louis-East St. Louis commercial zone and Sikeston, which is in Scott County, all of the Missouri points named are situated in New Madrid, Pemiscot, and Dunklin Counties; in the southeastern corner of the State. Despite applicant's plans originally to operate as an irregular-route carrier under the certificates issued to him, the cessation of operation by another carrier combined with the demands of the shippers in the territory served have required him to provide overnight service and daily delivery over certain regular routes as the most direct and feasible; hence his request for change of status so that the certificates may conform to the character of service required.

Traffic now moved by applicant between St. Louis proper and southeastern Missouri points is intrastate in character, but, if hauled over the proposed route or routes east of the river, would become interstate. Many additional points in that region also are desired to be served over regular interstate routes from St. Louis, namely, Sikeston and some of those now served from Cai[2] and Canalou, Laforge, Gideon, and Blytheville. Additional points that would be served from Cairo are Sikeston, Gideon, and Blytheville and from Memphis they are Conran, Marston, Lilbourn, Risco, Parma, Catron, New Madrid, Kewanee, Matthews, Canalou, Laforge, and Gideon. Some of these are small places, without direct service, in which a general store or commissary may be the
32 principal receiver of shipments. A number are off the routes sought. Livestock is hauled by applicant from numerous points in this territory to the East St. Louis stockyards. Restrictions to prohibit the movement of traffic between St. Louis and Memphis are acceptable to applicant, but not to prohibit the movement of traffic between Cairo and Memphis. Applicant has not rendered any service between the latter points.

In support of applicant's claim that he has been providing a daily overnight service from and to the points under consideration, and the necessity for changing his status to that of a regular-route operator, applicant had available at the hearing for inspection of parties approximately 20,000 shipping documents said to cover deliveries made by him during the last 6 months of 1949. The demands of the shippers and receivers of freight and the distance and convenience of operation have tended to confine his operations to particular routes. Reliance on irregular demands and deliveries is said to have been found inadequate and unsatisfactory.

Ten witnesses in addition to applicant appeared in support of the title application. A dealer in hardware and furniture at *Portageville*, has used applicant's service regularly 6 days a week for the movement of traffic from St. Louis, Cairo, and Memphis and it has been wholly satisfactory. Formerly, another motor carrier performed regular-route service from and to these points, but upon discontinuance of its operation, applicant was called upon to provide this transportation, which is overnight in time of delivery. Approximately 50 percent of his shipments originate at St. Louis and points beyond, 25 percent at Cairo, and 25 percent at Memphis. The total volume equals about one ton per day. At times in the past this dealer has utilized L. A. Tucker Truck
33 Lines, Frisco Transportation Company, and St. Louis-San Francisco Railway Company for shipments that origi-

[2] Conran, Marston, Lilbourn, Risco, Parma, Catron, Kewanee, and Matthews.

nated at St. Louis and points beyond. He was not informed regarding carriers other than applicant that now operate to and from Cairo or Memphis.

Another witness from *Portageville*, the population of which is 3,000, was its mayor, a dealer in farm equipment, who has found applicant's service to be adequate and satisfactory during the past 3 years. For approximately 2 years the service has been performed daily. He also uses L. A. Tucker Freight Lines at times and this service has been satisfactory. Much of the farm equipment is transported by railroad to distribution points, such as St. Louis, or other points on the rail line, from which it is delivered by Frisco Transportation Company or is called for by the consignee. The service of Frisco Transportation Company has not been entirely satisfactory. Witness desires the continuance of applicant's service as now performed along with that of other carriers.

A dealer in general hardware, furniture, and farm implements at *Steele* (in Pemiscot County), population 2,250, has used applicant's service from its commencement and he deems the continuance of daily deliveries from St. Louis, Cairo, and Memphis essential for the proper conduct of his business. His shipments amount to about 20 tons per month. He knows of no motor carrier other than applicant which operates to and from Cairo and is not well informed regarding others that operate to and from St. Louis or Memphis.

A wholesale dealer in automobile parts and equipment at *Caruthersville* (Pemiscot County), population 11,000, has used applicant's service daily for a number of years and has found it to be adequate and satisfactory. Apart from applicant and
34 certain railroads or their motor carrier affiliates, witness knew of only one motor carrier serving Caruthersville and it is not dependable. Continuance of the present daily service by applicant is urged.

A dealer in hardware and farm implements at *New Madrid*, population about 3,000, has used applicant's service regularly since the cessation of operation by another carrier, mainly from St. Louis and Cairo, has found it to be adequate and satisfactory, and desires its continuance. Apparently, several other motor carriers serve New Madrid, one of which has hauled shipments for him frequently and another occasionally. Their service is said to be slower than that performed by applicant.

Another dealer in hardware and farm implements at *Parma*, population, 1,500, and New Madrid, both in New Madrid County, has been served regularly by applicant at both places of business, mainly in connection with shipments from St. Louis, Cairo, Paducah, Ky., Evansville, Ind., and points beyond. He receives shipments 2 or 3 times a week. Applicant's service has been satis-

factory and its continuance is urged. Parma now is served only by railroad and by applicant.

A retail furniture dealer at *Gideon*, population 2,000, on the St. Louis-San Francisco and St. Louis Southwestern railways, in New Madrid County, has no motor-carrier service whatever. Rail service is said to be too slow, and in some instances the witness has to use his own truck to pick up shipments at rail stations. The service proposed by applicant is said to be needed and its authorization is urged.

The testimony of a dealer in harware and dry goods at Gideon is substantially the same as that of the furniture dealer and the service proposed by applicant is desired. Less-than-carload
35 shipments are received from various points east and north of Gideon practically every day. Many of the shipments move from or through St. Louis. Occationally, truck shipments are consigned to him at Malden, Mo., 11 miles distant, where he calls for them with his own truck.

A hardware dealer at *Blytheville*, population 15,000, receives shipments mainly from St. Louis and Memphis and points beyond, by two railroads and their motor carrier affiliates, and by Highway Express, a motor carrier. The service from Memphis has been satisfactory, but that from northerly points has been inadequate. Witness believes that the service proposed by applicant would greatly improve the situation in that respect. He has not, however, used the services of a number of the intervening motor carriers which operate between St. Louis and Blytheville.

A milling company at *Sikeston*, population 10,000, has utilized applicant's *service from Memphis* for a number of years in the movement of empty bags, with full satisfaction. While the purchases are frequent throughout the year, shipments by for-hire carriers do not occur every day, as the company operates 15 trucks of its own. It has not used the services of Memphis Transport Company or Gordon's Transport from Memphis to Sikeston and these carriers have never solicited its business.

Evidence in opposition to the application was presented by the St. Louis-San Francisco Railway Company, its motor carrier affiliate the Frisco Transportation Company, and a number of motor common carriers of general commodities. The railway company operates extensively throughout eastern Missouri and Arkansas. Among the stations on its St. Louis-Memphis line are Sikes-
36 ton, Kewanee, Lilbourn, Marston, Conran, Portageville, Steele, and Blytheville, which are involved here. Carthersville is the terminus of a branch line from Poplar Bluff, Mo., through Kennett and Hayti, Mo. Parma, Risco, Gideon, and Kennett are on a more westerly line from St. Louis. New Madrid is the easterly terminus of a branch line of the St. Louis Southwestern Railway from Malden through Lilbourn. This company's

main line southward from St. Louis crosses that of the St. Louis-San Francisco at Gideon. The latter operates two local freight trains each way daily between St. Louis and Memphis, serving the points on its lines named. The trains are not loaded to capacity and additional tonnage could be handled without impairing the present service. One freight station at St. Louis handles traffic that comes in or goes out of that city; the other handles traffic transferred between carriers there, for delivery at points beyond. Collection and delivery is provided at all other agency stations.

Frisco Transportation Company performs substitute service for the St. Louis-San Francisco Railway throughout this territory. All traffic handled by it is coordinated with the rail operation of the parent company and service is provided daily except Sundays. Breakbulk points on the railroad for traffic moved from or through St. Louis are Chaffee, Sikeston, and Hayti, Mo., and Blytheville, from which distribution is made by this affiliate to most of the points involved.

Intervener Kimbel Lines, Inc., operates daily between *St. Louis and Memphis via Sikeston and Blytheville and serves* Caruthersville as an off-route point, among other rights. Its routes southward from St. Louis on each side of the Mississippi River converge at Cape Girardeau, Mo. Its equipment comprises 46 trucks, 55 tractors, and 80 semitrailers and it maintains terminals at
37 the above-named termini. From 8 to 10 vehicles move in each direction daily except Sundays. The volume of traffic obtainable at *Sikeston*, Caruthersville, and Blytheville is said not to justify the maintenance of agencies there, but the business is solicited and, if increased service should become necessary, this carrier is ready and willing to provide it. Small shipments destined to Sikeston or Blytheville are usually turned over to other carriers. Up to 10 or more trucks are said now to be idle most of the time and it is urged that no need exists for the service proposed by applicant.

Viking Freight Company, of St. Louis, maintains regular schedules daily between St. Louis and Cairo, between Memphis and Cairo, and between St. Louis and Memphis. Several other motor carriers also are authorized to perform similar transportation. The only intermediate point with which it is concerned here is Cairo, as it does not serve any of the southeastern Missouri points under consideration. It operates 28 trucks, 208 tractors, and 248 trailers and has heard of no complaint about its service.

Walsh Freight Lines, of St. Louis, which recently acquired certain common-carrier rights from Robertson Truck Lines, Inc., operates between St. Louis and Memphis via Paragould, Ark., over U. S. Highway 3 from St. Louis to Ware, Ill., thence over Illinois Highway 146 to the Mississippi River and across the river to Cape Girardeau, thence over U. S. Highway 61 to Sikeston, thence over

U. S. Highway 60 to Dexter, Mo., thence over Missouri and Arkansas Highways 25 to Paragould, and thence over Arkansas Highway 1 and U. S. Highways 63, 61 and 70 to Memphis. All intermediate points between Dexter and the Arkansas-Missouri State line,
38 including Clarkton, Holcomb, Kennett, Caruth, Senath, Arbyrd, and Cardwell, are served. Blytheville is not an authorized point. It operates 14 tractor-trailer units and daily overnight service is provided between the points served by it. Points in this territory also are said to be served by another motor carrier and it is contended that no need for applicant's proposed service exists.

L. A. Tucker Truck Lines, of Cape Girardeau, provides daily overnight service between Cairo and points on U. S. Highway 61 from *Sikeston* to Portageville, inclusive, and additionally serves several off-route points, mainly Marston, Lilbourn, New Madrid, Matthews, and Canalou. These points also are served by it directly from St. Louis. It operates 14 trucks, 26 tractors, and 32 trailers, maintains terminals at Cairo, Sikeston, and New Madrid and has a call station at Portageville. Some of its equipment now is idle and additional tonnage could be handled. In view of the prevailing competition this carrier is of the opinion that no need for the proposed service exists.

Memphis Transports, Inc., of Memphis, a motor common carrier, operates between St. Louis and Memphis, from St. Louis to East St. Louis, thence over Illinois Highway 3 to McClure and Illinois Highway 146 to Cape Girardeau, thence over U. S. Highway 61 to West Memphis, and across the river to Memphis, serving all intermediate points, including those specified herein. Terminals are maintained at the termini named and daily overnight service with 5 schedules is provided. This carrier believes that another regular-route carrier, such as applicant, would create additional and unnecessary competition.

39 Gordon's Transport, Inc., of Memphis, also operates as a motor common carrier between points in the St. Louis-East St. Louis commercial zone and Memphis over segments of Illinois Highways 13, 159, 3, and 146 from St. Louis, across the Mississippi River to Cape Girardeau and thence over Missouri Highway 74 to junction U. S. Highway 61 and thence over the latter highway to Memphis. It is authorized to serve Sikeston and all intermediate points in Missouri and Arkansas between Sikeston and Memphis. The transit time between St. Louis and Memphis is approximately 10 hours. Daily through service is provided, with 2 runs one night and 3 runs the next night. The volume of traffic available at the points involved is said to be light and it is contended that another regular-route carrier would increase competition. This carrier suspended operations because of a strike in 1945 and resumed service on November 15, 1949. Sikeston and

Blytheville are the only intermediate points served during the first 2 months after that date.

A. L. Hogan, doing business as Hogan Truck Line, of Kennett, a motor common carrier, is authorized to operate between St. Louis and Memphis over segments of Illinois Highways 13, 159, and 3 to Chester, Ill., thence over Missouri Highways 51 and 25 to Kennett, thence over Missouri Highway 84 to Hayti, and thence over U. S. Highway 61 to Memphis, serving the intermediate and off-route points of Clarkton, Holcomb, Kennett, Caruth, Senath, Arbyrd, Cardwell, and Hornersville. Terminals are maintained at St. Louis, Kennett, and Memphis. One tractor-trailer unit is operated each way per night. Hogan contends that the proposed regular-route operation would result in greater competition than the present irregular-route service and would be detrimental to him.

40 Superior Forwarding Company, of St. Louis, a motor common carrier, operates over both Missouri and Illinois routes between St. Louis and Blytheville and numerous other Arkansas points, chiefly Little Rock, over U. S. Highway 61 for a part of the distance. It operates 7 trucks, 30 tractors, and 25 semitrailers and maintains terminals at St. Louis and 4 points in Arkansas. It operates from 8 to 14 schedules daily over its main and branch routes. Service at Blytheville is not regular but as the movement of traffic to or from that point requires, perhaps once or twice per week.

No. MC-105120 (Sub-No. 4)—By this application authority is sought to operate between New Madrid and Memphis over U. S. Highway 61, serving the intermediate points of Marston and Conran, Mo., and the off-route points of Kewanee, Matthews, Lilbourn, Catron, Parma, Risco, Gideon and Campbell, Mo. Applicant does not propose to transport over this route any traffic moving between Memphis and points in the St. Louis-East St. Louis commercial zone and beyond and he agreed that any grant of authority should be so restricted.

Although applicant is authorized to serve the points named in this application (other than Memphis) in connection with his irregular-route operations to and from Cairo, he holds no authority to serve such points in respect of operations to or from Memphis. Aside from a coordinated service provided by the rail carriers and their motor carrier affiliates at Parma, Risco, Gideon, and New Madrid, it is said that the points proposed to be served are without any service.

In addition to applicant, five shippers or receivers of freight appeared in support of this application. A dealer in hardware and farm implements at Parma receives by rail from Memphis shipments of the named commodities several times a week.

41 The rail service, which is the only service available at

this point, is said to be too slow and witness expressed a need for the proposed service. This dealer has a similar business at New Madrid and he indicated that the situation there is comparable to that at Parma.

An individual who operates a dry goods and grocery store at Catron and is general manager of Catron Farms, Inc., also at that point, professed a need for the proposed service on his own behalf as well as for the company. Shipments of hardware, parts for gins and dry goods and received from Memphis by rail. There are no depot facilities at Catron and the rail service is not deemed to be satisfactory. No motor carrier serves Catron from Memphis and the proposed service would be very beneficial to both businesses.

The three remaining witnesses represent business establishments at Gideon. One deals in general merchandise, another in furniture and appliances, and the other operates a department store. Two of the concerns receive shipments of various commodities from Memphis several times a week and the other averages a shipment a day from Memphis. The latter also has occasion to return certain items to Memphis for repair. Gideon is on a branch line of railroad and shipments received by rail from Memphis are said to require from 3 days to a week. Overnight service is needed and the proposed service would be used if authorized.

As previously stated, the intervening carriers disclaimed any further interest in this application, upon applicant's agreement to the imposition of a restriction precluding the transportation over the involved Memphis-New Madrid route of freight moving between Memphis and points in the St. Louis-East St. Louis commercial zone.

42 DISCUSSION AND CONCLUSIONS

In the title application, the examiner recommended that applicant be granted the authority sought, except that service at McClure and Chester was limited to the joinder at those points of certain of the proposed routes. Additionally, with respect to route 4 (Cairo-Missouri-Arkansas State line), he *recommended that applicant be authorized to serve all points in a described portion of Dunklin County, although applicant sought to serve only certain named points in that county.*

In No. MC-105120 (Sub-No. 4), the joint board recommended that applicant be granted authority to transport general commodities, with certain exceptions, between Memphis and New Madrid over U. S. Highway 61, serving Catron, Gideon, and Parma, as off-route points, subject to the restriction that no service is to be rendered to or from New Madrid and that no service is to be performed between Memphis and points in the St. Louis-East St.

Louis commercial zone. It was further recommended that this application be otherwise denied. As stated, no exceptions were taken to the recommended order of the joint board but it was stayed by us.

In the title proceeding, however, joint exceptions were filed by a number of the opposing motor carriers to the order recommended by the examiner. They contend that no need has been shown for the proposed service either in respect of the conversion of irregular-route authority to regular routes or of service to new points. They point out that under the grant of authority recommended, applicant would be able to serve numerous points which he is not now authorized to serve under his irregular-route authority and as to which either no shipper evidence was presented or no evi-
dence of inadequacy of the services of existing carriers was
43 established; and that in respect of the recommended grant
between Cairo and points in southeastern Missouri (proposed route 4), the examiner included points not within the scope of the amended application. These interveners urge that this application should be denied in its entirety on the ground that no inadequacy in the services of existing carriers has been shown.

Applicant is now authorized to operate over irregular routes, between points in the St. Louis-East St. Louis commercial zone, Memphis, and Cairo, on the one hand, and, on the other, Portageville and points in Pemiscot County; also between Memphis and Sikeston, and between Cairo, on the one hand, and, on the other, Marston, Conran, Lilbourn, Risco, Parma, Catron, New Madrid, Kewanee, Matthews, Kennett, Caruth, Hornersville, Senath, Arbyrd, and Cardwell. In conducting these operations, however, applicant has operated principally over the routes for which authority is here sought. Upon cessation of operation by another motor common carrier several years ago, he gained some of the traffic formerly transported by that carrier and, as a result of increased traffic and demands for his service, he has since that time provided daily overnight service. Applicant does not propose to serve Cairo or Memphis in respect of traffic moving to and from points in the St. Louis-East St. Louis commercial zone, hence the proposed conversion from irregular to regular-route operation would not markedly alter the present competitive situation except possibly to or from St. Louis. In this connection, however, certain of the shippers or receivers of freight in the southeastern portion of Missouri have been using applicant's service from St. Louis but apparently this traffic has moved under applicant's intrastate authority. Moreover, a number of the points in this area
which applicant is now authorized to serve interstate to or
44 from Cairo or Memphis only, are without any interstate
motor carrier service from St. Louis. The supporting shippers, with the exception of those at Gideon and Blytheville, are

located at points which applicant is authorized to serve. Interveners do not serve Gideon and the evidence establishes that this point is inadequately served. Blytheville, however, is served by several motor carriers in addition to two railroads, and no need is shown for the proposed service to or from that point. In our opinion, a grant of regular-route authority in the title proceeding to the extent indicated in our findings herein is warranted. *The record, however, does not justify a grant to serve the additional points sought.* In order to eliminate certain duplications the proposed routes have been redescribed in our findings herein.

There remains for consideration applicant's request in No. MC-105120 (Sub-No. 4) to operate between New Madrid and Memphis, over U. S. Highway 61, serving certain intermediate and off-route points. Our grant in the title application authorizes applicant to operate over this segment of U. S. Highway 61 and also to serve all the intermediate and off-route points for which authority is here sought, except the off-route point of Campbell. No evidence was presented with respect to this point. In the circumstances, this application will be denied except to the extent granted in the title proceeding.

Applicant is fit and able, financially and otherwise, to conduct the operations described in our findings herein.

Findings

In Nos. MC-105120 (Sub-No. 3) and MC-105120 (Sub-No. 4), we find that the present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities, except articles of unusual value, dangerous explosives,
45 household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467, commodities in bulk, and those requiring special equipment, between the points, over the routes, and in the manner described in appendix B hereto; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and our rules and regulations hereunder; that upon receipt from applicant of a request in writing for the coincidental revocation of his certificates Nos. MC-105120, MC-105120 (Sub-No. 1), and MC-105120 (Sub-No. 2), a certificate authorizing these operations should be granted; and that these applications in all other respects should be denied.

Upon compliance by applicant with the requirements of sections 215 and 217 of the act, with our rules and regulations thereunder, and with the condition specified above, an appropriate certificate will be issued. An order will be entered denying the applications except to the extent granted herein.

46

APPENDIX A

ROUTES SOUGHT IN No. MC-105120 (SUB-No. 3).

(1) Between East St. Louis and Cairo, Ill., from East St. Louis over Illinois Highway 3 to Cairo and alternatively from East St. Louis over Illinois Highway 13 to Belleville, Ill., and thence over Illinois Highway 159 to Red Bud, Ill., and return over the same route or routes, for operating convenience, serving all points in the St. Louis, Mo.-East St. Louis, Ill., commercial zone, as defined in 1 M. C. C. 656 and 2 M. C. C. 285, as intermediate or off-route points, with service at Cairo restricted to joinder of this route with route 4 below.

(2) Between Chester, Ill., and junction of Missouri Highway 55 and U. S. Highway 61, from Chester across Mississippi River and over Missouri Highway 51 to Perryville, Mo., thence over Missouri Highway 25 to Jackson, Mo., and thence over Missouri Highway 55 to junction with U. S. Highway 61 near Morley, Mo., and return over the same route, for operating convenience only, with no service at intermediate points and with service at the termini restricted to the joinder of this route with routes 1 and 3 herein.

(3) Between McClure, Ill., and Blytheville, Ark., from McClure over Illinois 146 to and across the Mississippi River to Cape Girardeau, Mo., thence over Missouri Highway 74 to junction with U. S. Highway 61, and thence over the last-named highway to Blytheville and return over the same route, serving Sikeston, Mo., and all points on the described segment of U. S. Highway 61 south of Sikeston and all other points in New Madrid and Pemiscot Counties, Mo., as off-route points, with service at McClure limited to the joinder of this route with route 1.

(4) Between Cairo, Ill., and Missouri-Arkansas State line, from Cairo over U. S. Highway 60 to Sikeston, Mo., thence over U. S. Highway 61 to Hayti, Mo., thence over Missouri Highway 84 to Kennett, Mo., and thence over Missouri Highway 25 to Missouri-Arkansas State line and return over the same route, serving as intermediate or off-route points, Sikeston, Clarkton, Holcomb, Kennett, Caruth, Hornersville, Senath, Arbyrd, and Cardwell, Mo., and points in New Madrid and Pemiscot Counties, Mo.

(5) Between Sikeston, Mo., and Memphis, Tenn., over U. S. Highway 61, serving Sikeston and Portageville, Mo., and all other points in Pemiscot County, Mo., as intermediate or off-route points.

No service between points in the St. Louis-East St. Louis commercial zone and Memphis to be performed over any combination of the above routes.

47

APPENDIX B

ROUTES AUTHORIZED IN NO. MC-105120 (SUB-NO. 3)

Route 1—Between St. Louis, Mo., and Memphis, Tenn.

From St. Louis across the Mississippi River to East St. Louis, Ill., thence over Illinois Highway 3 via Red Bud, Chester and McClure, Ill., to Cairo, Ill., (also from East St. Louis over Illinois Highway 13 to Belleville, Ill., and thence over Illinois Highway 159 to Red Bud, thence in the manner specified to Cairo), thence over U. S. Highway 60 to Sikeston, Mo., thence over U. S. Highway 61 through Hayti, Mo., to Memphis, and return over the same route, serving the following intermediate or off-route points: Those in the St. Louis, Mo.,-East St. Louis, Ill., commercial zone as defined by this Commission; those in Pemiscot County, Mo., *Cairo, Ill.*, and *Sikeston, Matthews, Kewanee,* New Madrid, Marston, Conran, Lilbourn, Catron, Parma, Risco, Gideon, and Portageville, Mo.

Restriction: No service shall be rendered between points in the St. Louis, Mo.,-East St. Louis, Ill., commercial zone, on the one hand, and on the other hand, Cairo, Ill., and Memphis, Tenn., or between Cairo and Memphis.

Route 2—Between Chester, Ill., and Sikeston, Mo.

From Chester across the Mississippi River and thence over Missouri Highway 51 to Perryville, Mo., thence over Missouri Highway 25 to Jackson, Mo., and thence over Missouri Highway 55 to junction U. S. Highway 61, near Morley, Mo., thence over U. S. Highway 61 to Sikeston, and return over the same route, serving no intermediate points and with service at Chester restricted to joinder of this route with route 1 above.

Route 3—Between junction Illinois Highways 3 and 146 near McClure, Ill., and junction Missouri Highway 55 and U. S. Highway 61 near Morley, Mo.

From junction Illinois Highways 3 and 146 over Illinois Highway 146 to the Mississippi River, thence across the Mississippi River to Cape Girardeau, Mo., thence over Missouri Highway 74 to junction U. S. Highway 61, thence over U. S. Highway 61 to junction Missouri Highway 55 near Morley, and return over the same route, serving no intermediate points, and with service at the termini restricted to the joinder of this route with routes 1 and 2 above.

48 Route 4—Between Hayti, Mo., and junction Missouri Highway 25 and Missouri-Arkansas State line.

From Hayti over Missouri Highway 84 to Kennett, Mo., thence over Missouri Highway 25 to the Missouri-Arkansas State line, and return over the same route, serving the inter-

mediate and off-route points of Kennett, Caruth, Senath, Arbyrd, Cardwell, and Hornersville, Mo.

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49 ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 13th day of January, A. D. 1950.

No. MC-105120 (Sub-No. 3)

C. L. CUNNINGHAM EXTENSIONS—MISSOURI AND OTHER STATES

No. MC-105120 (Sub-No. 4)

C. L. CUNNINGHAM EXTENSION—NEW MADRID, MO.

Investigation of the matters and things involved in these proceedings having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part thereof:

It is ordered, That said applications, except to the extent granted in said report be, and they are hereby, denied.

By the Commission, division 5.

W. P. BARTEL,
(Seal) Secretary.

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50 **Exhibit IV to Complaint.**

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 4th day of May, A. D. 1950.

No. MC-105120 (Sub-No. 3)

C. L. CUNNINGHAM EXTENSIONS—MISSOURI AND OTHER STATES

No. MC-105120 (Sub-No. 4)

C. L. CUNNINGHAM EXTENSION—NEW MADRID, MO.
Caruthersville, Missouri

Upon consideration of the records in the above-entitled proceedings, and of joint petition for reopening and reconsideration by L. A. Tucker Truck Lines, Inc., Viking Freight Company, Righter Trucking Company, Superior Forwarding Company, J. F. Walsh, doing business as Walsh Freight Lines, and A. L. Hogan, doing

business as Hogan Truck Lines, interveners in opposition, dated March 13, 1950; and good cause appearing therefor:

It is ordered, That said petition be, and it is hereby denied, for the reason that the evidence adequately supports the findings of Division 5.

By the Commission.

W. P. BARTEL,
Secretary.

(Seal)

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51 **Exhibit V to Complaint.**

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 29th day of June, A. D. 1950.

No. MC-105120 (Sub-No. 3)

C. L. CUNNINGHAM EXTENSION—MISSOURI AND OTHER STATES
Caruthersville, Missouri

Upon consideration of the record in the above-entitled proceeding, and of petition for reconsideration by L. A. Tucker Truck Lines, Inc., intervener in opposition, dated June 2, 1950; and good cause appearing therefor:

It is ordered, That said petition be, and it is hereby, dismissed, under Rule 101(f) of the Commission's General Rules of Practice.

By the Commission.

W. P. BARTEL,
Secretary.

(Seal)

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52 **Exhibit VI to Complaint.**

C-15.1

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

No. MC 105120 *

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* This certificate covers the authority granted in the certificate issued to the above-named carrier in this proceeding and in Nos. MC 105120 Sub 1 and MC 105120 Sub 2 on January 6, 1945, June 9, 1947 and June 14, 1946, respectively, and also embraces the operations authorized in Nos. MC 105120 Sub 3 and MC 105120 Sub 4.

C. L. CUNNINGHAM,

DOING BUSINESS AS PEMISCOT MOTOR FREIGHT CO.,
Caruthersville, Missouri

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 7th day of August, A. D., 1950.

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

General commodities, except articles of unusual value, dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M. C. C. 467, commodities in bulk, and those requiring special equipment, over regular routes,

Between St. Louis, Mo., and Memphis, Tenn.:

From St. Louis across the Mississippi River to East St. Louis, Ill., thence over Illinois Highway 3 via Red Bud, Chester and McClure, Ill., to Cairo, Ill. (also from East St. Louis over Illinois Highway 13 to Belleville, Ill., and thence over Illinois Highway 159 to Red Bud, thence in the manner specified to Cairo), thence over U. S. Highway 60 to Sikeston, Mo., thence over U. S. Highway 61 through Hayti, Mo., to Memphis, and return over the same route.

Service is authorized to and from the following intermediate and off-route points: those in the St. Louis, Mo.-East St. Louis, Ill., commercial zone as defined by this Commission; those in Pemiscot County, Mo., Cairo, Ill., and Sikeston, Matthews, Kewanee, New Madrid, Mars-

ton, Conran, Lilbourn, Catron, Parma, Risco, Gideon, and Portageville, Mo.

RESTRICTION: No service shall be rendered between points in the St. Louis, Mo.-East St. Louis, Ill., commercial zone, on the one hand, and, on the other hand, Cairo, Ill., and Memphis, Tenn., or between Cairo and Memphis.

53 Between Chester, Ill., and Sikeston, Mo.:

From Chester across the Mississippi River and thence over Missouri Highway 51 to Perryville, Mo., thence over Missouri Highway 25 to Jackson, Mo., and thence over Missouri Highway 55 to junction U. S. Highway 61 near Morley, Mo., thence over U. S. Highway 61 to Sikeston, and return over the same route.

Service is not authorized to or from the intermediate points and service at Chester is restricted to joinder of this route with the route described above.

Between junction Illinois Highways 3 and 146 near McClure, Ill., and junction Missouri Highway 55 and U. S. Highway 61 near Morley, Mo.:

From Junction Illinois Highways 3 and 146 over Illinois Highway 146 to the Mississippi River, thence across the Mississippi River to Cape Giardeau, Mo., thence over Missouri Highway 74 to junction U. S. Highway 61, thence over U. S. Highway 61 to junction Missouri Highway 55 near Morley, and return over the same route.

Service is not authorized to or from the intermediate points, and service at the termini is restricted to the joinder of this route with the routes described above.

Between Hayti, Mo., and junction Missouri Highway 25 and Missouri-Arkansas State line:

From Hayti over Missouri Highway 84 to Kennet, Mo., thence over Missouri Highway 25 to the Missouri-Arkansas State line, and return over the same route.

Service is authorized to and from the intermediate and off-route points of Kennett, Caruth, Senath, Arbyrd, Cardwell, and Hornersville, Mo.

IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

AND IT IS FURTHER ORDERED, That this certificate shall supersede the certificates issued to the above-named carrier in this proceeding and in Nos. MC 105120 Sub 1, and MC 105120 Sub 2 on

January 6, 1945, June 9, 1947 and June 14, 1946, respectively, which are hereby canceled.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

(Seal)

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54 IN UNITED STATES DISTRICT COURT

Order Designating Honorable Joseph W. Woodrough, United States Circuit Judge, and Honorable Rubey M. Hulen, United States District Judge, to Sit With Honorable Roy W. Harper, United States District Judge for the Eastern District of Missouri.—Filed September 15, 1950.

L. A. Tucker Truck Lines, Inc., a corporation, plaintiff in the above entitled suit, having filed suit which is now pending in the United States District Court for the Eastern District of Missouri, seeking a temporary and permanent injunction against the Interstate Commerce Commission restraining it from enforcing certain orders on the grounds, among others, that said orders are violative of certain provisions of the Constitution of the United States; and said application for injunction having been presented to the Honorable Roy W. Harper, United States District Judge for the Eastern District of Missouri, and said Judge having notified the Chief Judge of the United States Court of Appeals for the Eighth Circuit thereof;

IT IS NOW HERE ORDERED that Honorable Joseph W. Woodrough, United States Circuit Judge, and Honorable Rubey M. Hulen, United States District Judge for the Eastern District of Missouri, be and they hereby are designated to sit with the above named Roy W. Harper, United States District Judge for the Eastern District of Missouri, to hear and determine said action and proceeding.

Dated this 14th day of September, A. D. 1950.

/s/ ARCHIBALD K. GARDNER,
Chief Judge of the United States Court of Appeals, for the Eighth Circuit.

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55 IN UNITED STATES DISTRICT COURT

[Title omitted.]

Answer of the United States of America—Filed November 16, 1950.

Now comes the UNITED STATES OF AMERICA, defendant, and for answer to the complaint of plaintiff filed in the above captioned action admits, denies and avers as hereinafter set forth:

1. Answering the allegations of paragraphs 1 and 2, the United States admits that this is an action seeking to annul, set aside and enjoin an order of the Interstate Commerce Commission, and that the jurisdiction of the court is invoked under the provisions of Sections 1336, 2321-25 of Title 28 United States Code.

2. Answering the allegations of paragraph 3, the United States, on information and belief, admits the same.

3. Answering the allegations of paragraphs 4 to 10, inclusive, the United States admits the occurrence of all procedural action before the Commission therein described.

4. Answering the allegations of paragraph 11, the United States denies the same, and for further answer respectfully refers the court to the Commission's report therein referred to and the record made before the Commission, for a complete statement of the grounds to support the action of the Commission.

56 5. Answering the allegations of paragraph 12, the United States admits that the certificate therein described was issued by the Commission on August 7, 1950.

6. Answering the allegations in paragraphs 13 to 15, inclusive, the United States denies the same, except that with respect to the allegation in paragraph 14, it neither admits nor denies the conclusion of law therein stated.

7. For further answer to plaintiff's complaint, the United States avers that the report and order therein assailed were made and issued within the Commission's statutory authority upon substantial evidence after full and fair hearing, and that the report and order are lawful and valid in all respects. Defendant, United States, denies that said report and order are invalid for the reasons assigned in plaintiff's complaint, or for any reason whatsoever.

WHEREFORE, having fully answered the complaint, the United States prays that the relief therein sought be denied and the complaint dismissed with costs to plaintiff, and that defendant, United States, have the benefit of such other and further orders, decrees or relief as may be just and proper.

WILLIAM J. HICKEY,
Special Assistant to the Attorney,
Department of Justice,
Washington, D. C.

WM. AMORY UNDERHILL,
Acting Assistant Attorney General,

JAMES E. KILDAY,
JOHN F. BAECHER,
Special Assistants to the Attorney General,

DRAKE WATSON,
United States Attorney,
Attorneys for the United States of America, Defendant.

57 Certificate of Service (omitted in printing).

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58 IN UNITED STATES DISTRICT COURT

[Title omitted.]

[File endorsement omitted.]

Answer of the Interstate Commerce Commission—

Filed November 10, 1950.

The Interstate Commerce Commission, a defendant in the above-entitled case, answering the complaint filed herein, says:

1-3. It admits the purpose of the suit; the jurisdiction of this Court; and the incorporation of the plaintiff. It also admits that plaintiff is a common carrier and holds a certificate for motor carrier operation issued by this Commission.

4-10. It admits the allegations of paragraphs numbered 4 to 10, inclusive, of the complaint relating to the proceedings before this Commission and as to the procedures had and the action taken therein.

11-13. Answering paragraphs 11 to 13, inclusive, the Commission denies that its findings and conclusions are not supported by the evidence adduced in the proceeding before it in the application of C. L. Cunningham d/b/a Pemiscot Motor Freight Company, either in respect of need for service generally or in respect to need for service between St. Louis, Mo.—East St. Louis, Ill., Commercial Zone, and Sikeston, Mo.; on the contrary, it avers that there was sufficient and competent evidence to support its findings and conclusions and to warrant and justify its action in granting
59 a certificate of convenience and necessity to said Cunningham. It specifically denies that the issuance of said certificate was unjust, arbitrary and unreasonable and without basis in law or fact, and it also denies that the said certificate is void for the reasons asserted in the complaint or for any other reason or reasons.

14. The Commission admits the allegations of paragraph numbered 14.

15. Answering paragraph numbered 15, the Commission denies that its action complained of by plaintiff has deprived the plaintiff of any right or any property, in violation of the provisions of the Fifth Amendment to the Constitution; to the contrary it asserts that the apparent, though not stated, basis for the plaintiff's claim of deprivation of rights is its fear of the competition of Pemiscot Motor Freight Company, or the fact of such competition. The Commission respectfully submits that the Interstate Commerce Act does not contemplate, intend, or provide that operations au-

thorized under the provisions of the Motor Carrier Act shall be guaranteed freedom from competition.

Further answering the complaint, the Commission avers that in the proceeding before it referred to in the complaint herein, the parties thereto, including the plaintiff herein, were, and each of them was, accorded the full hearing provided for by the Interstate Commerce Act; that in said hearings testimony and other evidence bearing on the matters covered in the report and order were submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of plaintiff; that at said hearing and subsequently, both orally and in briefs, questions relating to the said matters were fully argued and submitted to the Commission for determination, including many of the particular questions raised by plaintiff in this suit.

60 The Commission further alleges that each and all findings and conclusions in said report were and are supported by substantial evidence.

The Commission also alleges that in making said report of January 13, 1950, it considered and weighed carefully in the light of its own knowledge and experience all of the facts and conditions called to its attention by the parties to the proceeding, including many of the questions and matters covered by the allegations of the complaint herein.

The Commission further alleges that said report and order were not made or entered either arbitrarily or capriciously or contrary to the relevant evidence or without evidence to support them; that in making said report and order the Commission did not exceed the authority duly conferred upon it, and it denies each and every allegation to the contrary contained in the complaint herein. The Commission denies that its said order is arbitrary, unreasonable, unlawful, or null and void for any of the reasons set forth in the complaint herein, or for any other reason or reasons.

Except as herein expressly admitted, the Commission denies the truth of each and every allegation contained in the complaint insofar as they conflict with the allegations herein, or with the statement or conclusions contained in said report of January 13, 1950, and its order of that date.

WHEREFORE, the Commission prays that the complaint be dismissed.

INTERSTATE COMMERCE COMMISSION,
By: DANIEL W. KNOWLTON,
Chief Counsel.
H. L. UNDERWOOD,
Assistant Chief Counsel.

61 Certificate of Service (omitted in printing).

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62 IN UNITED STATES DISTRICT COURT

[Title omitted.]

[File endorsement omitted.]

Motion for Leave of Court to Amend Petition—Filed May 25, 1951.

Comes now plaintiff herein, and moves the Court for leave to file an amendment to its petition and for reason for said motion, plaintiff states that said amendment is made for the purpose of raising the issue of the jurisdiction of the Interstate Commerce Commission and the validity of its order in proceedings entitled C. L. Cunningham, d/b/a Pemiscot Motor Freight Company, Docket No. MC 105120, Sub 3, of said Commission for the reasons stated in said amendment, copy of which is hereto attached.

B. W. La Tourette, and
G. M. Rebman,
314 North Broadway,
St. Louis, Missouri,
Attorneys for Plaintiff.

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63 IN UNITED STATES DISTRICT COURT

[Title omitted.]

[File endorsement omitted.]

Brief of Interstate Commerce Commission in Oppostion to Plaintiff's Motion for Leave to Amend Its Petition—Filed June 8, 1951.

STATEMENT.

This brief is submitted pursuant to the Court's direction at the hearing on May 25, 1951.

The motion to amend seeks to inject a claim that the proceeding before the Commission involving the application under Section 207(a) of C. L. Cunningham, d/b/a Pemiscot Motor Freight Company, for a ceritficate of convenience and necessity authorizing common carrier operations, (Docket No. MC-105120, Sub-3), which resulted in allowance of the application and the granting of authority, followed by the issuance of a certificate of convenience and necessity to applicant, was null and void, for the reason that the Examiner by whom the hearing was held was not an Examiner appointed under the Administrative Procedure Act, Sec. 11, Title 5, U. S. Code, Sec. 1010.

64 ARGUMENT.

THE COURT SHOULD NOT AT THIS LATE DATE ALLOW AMENDMENT.

The complaint in this suit was filed September 12, 1950, the answer of the United States and that of the Commission were filed in November of that year. It was not until the date of the hearing had been set, May 25, 1951, and only a few days before, that the motion to amend was presented.

While, under the Rules of Civil Procedure, the granting of leave to amend after answer and after the cause is at issue is discretionary with the Court (Rule), yet we submit that after so long a period has elapsed, and without any substantial grounds for such allowance has been advanced to justify it, the discretion of the Court should not be exercise to allow the amendment when that would sanction and reward delay.

Further, it is significant that the motion was not filed until after the Supreme Court had entered judgment, reversing *Riss & Co., Inc.* v. *U. S.*; *per curiam*, on April 16, 1951.

Now, the Administrative Procedure Act was approved June 11, 1946. The hearing in the Cunningham application was held January 27, 1949. No objection to the hearing being held by the Examiner assigned by the Commission was made then or at any other time, until the Motion to Amend was filed.

In the *Riss* case there were two requests made to the Commission for a hearing before an Administrative Procedure Act Examiner, one request prior to the close of the hearing, and the other after the report and order of the Commission had been issued. Here in the present case no such request was made to the Commission.

65 THE GRANTING OF THE MOTION TO AMEND WOULD LEAD TO COMPLICATIONS IF THE COURT SHOULD REFER THE PLAINTIFF TO THE COMMISSION TO REQUEST ANOTHER HEARING.

Should the Court remand the case to the Commission for the purpose of requesting another hearing before an Administrative Procedure Act Examiner, the Commission would be faced with the fact that a certificate had been issued to Cunningham, the successful applicant in the Commission proceeding, on August 7, 1950. The plaintiff in his suit asks the setting aside of that certificate.

The problem of the Commission would be the matter of how to deal with the certificate. The reason for this is that while the Commission has power and authority upon complaint, or upon its own initiative after notice and hearing, to suspend, change or revoke a certificate for wilful failure to comply with the provisions of Part II of the Interstate Commerce Act, and the rules, regulations, orders or the terms of such certificate, yet that power is limited to certain specified items.

Section 212 of the Motor Carrier Act, 49 U. S. C. 312 provides:

> (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provisions of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier, or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

The case of *United States* v. *Seatrain Lines,* 329 U. S. 424, is pertinent here. In that case it was held that the Commission lacked authority to cancel a certificate which it had issued to Seatrain authorizing the transportation of "commodities generally" and to issue a new certificate which deprived Seatrain of the right to carry commodities generally and limited it to carrying liquid cargoes in bulk, empty railroad cars and property in freight cars.

The Court said, pp. 428, 429:

> In altering Seatrain's certificate, the Commission held that a certificate authorizing the carriage of "commodities generally" does not embrace the right to carry loaded or unloaded railroad cars; that consequently the original certificate granted

Seatrain actually deprived it of any future right to carry railroad cars—its chief business; that issuance of the original certificate to carry commodities generally was consequently an inadvertent error, patent on the fact of the record, which the Commission has the right and power to change at any time the matter comes to its attention. But Seatrain argues that, far from restoring the right to which it was entiled under the original proceedings, the new order actually results in a drastic limitation on the nature of the equipment and service Seatrain is privileged to employ in loading and carrying freight, and could bar delivery or receipt of freight to or from any consignees except railroads.

We need not determine the Commission's statutory power to correct clerical mistakes, since we are persuaded from Seatrain's applications for its certificates, from the information supplied to the Commission indicating that Seatrain had long transported goods of all kinds loaded in freight cars to consignees other than railroads, from the findings of the Commission, and from the course of the earlier decisions of the
67 Commission regarding Seatrain, that the issuance of the original certificate was not an "inadvertent" error which the Commission's subsequent action was intended to correct. For all these indicate that prior to and at the time of the issuance of the Seatrain certificate it was the understanding of Seatrain and the Commission that its transportation of "commodities generally" included carriage of freight cars and that carriage of freight cars would not exclude carriage of commodities generally. * * *

Since the proceedings apparently were not reopened to correct a mere clerical error but were more likely an effort to revoke or modify substantially Seatrain's original certificate under the new policy announced in the *Foss* case, the question remains whether the Act authorizes such alterations. The water carrier provisions are part of the general pattern of the Interstate Commerce Act which grants the Commission power to regulate railroads and motor carriers as well as water carriers. The Commission is authorized to issue certificates to all three types of carriers. But it is specifically empowered to revoke only the certificates of motor carriers. Section 212 (a), Part II, Interstate Commerce Act, 49 Stat. 555, 49 U. S. C. Sec. 312 (a). In fact, when the water carrier provisions were pending in Congress, the Commission's spokesman, Commissioner Eastman, seems specifically to have requested the Congress to include no power to revoke a certificate. * * * It is contended nonetheless that the Commission has greater power to revoke water carrier certificates, where Congress granted no specific authority at all, than to cancel

and revoke motor carrier certificates, where specific but limited authority was granted. But in ruling upon its power to revoke motor carrier certificates, the Commission itself has held that unless it can find a reason to revoke a motor carrier's certificate, which reason is specifically set out in sec. 212 (a), it cannot revoke such a certificate under its general statutory power to alter orders previously made. *Smith Bros. Revocation of Certificate*, 33 M. C. C. 465.

THE STATUS OF CUNNINGHAM, THE HOLDER OF THE CERTIFICATE.

The certificate of convenience and necessity issued to Cunningham represents a proprietary interest to which he is entitled and which is subject to transfer by him, with Commission approval.

Section 212 (b) of the Interstate Commerce Act, 49 U. S. C. 312 (b), provides:

"Any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe."

68 The case of *In Re Rainbo Express, Inc.*, 179 F. (2d) 1, considered the question of the status of such certificates and held (syl., 2):

"Certificates of public convenience and necessity issued to bankrupt by Interstate Commerce Commission and pledged by bankrupt to creditor as security for a loan under a chattel mortgage was transferable property capable of becoming subject matter of a chattel mortgage. * * *."

Being possessed of this certificate, Cunningham's interest is a substantial one and in the present posture of the case, he becomes an indispensable party, who will be affected by any decree entered, whose rights cannot be adjudicated behind his back and in whose absence the court will not proceed.

The classic case, much cited on the point, is *Shields* v. *Barrow*, 17 Howard 129. Pertinent parts of the opinion are at pages 139, 140, thus, p. 139:

"The court here points out three classes of parties to a bill in equity. They are: 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without

affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with the equity and good conscience."

and p. 140:

"Now it will be perceived, that in *Russell* v. *Clarke's Executors,* this court, after considering the embarrassments which attend the exercise of the equity jurisdiction of the circuit courts of the United States, advanced as far as this: They declared that formal parties may be dispensed with when they cannot be reached; that persons having rights which must be affected by a decree, cannot be dispensed with; and they express a doubt concerning the other class of parties. This doubt is solved in favor of the jurisdiction in subsequent cases, but without infringing upon what was held in *Russell* v. *Clarke's Executors,* concerning the incapacity of the court to give relief, when that relief necessarily involves the rights of absent persons. * * *."

The failure of Cunningham to appear in this case does not alter the situation. It is necessary that he be brought in if he does not voluntarily appear, else the Court cannot proceed to adjudicate his rights.

IT IS DOUBTFUL WHETHER PLAINTIFF HAS THE RIGHT TO DEMAND A HEARING BEFORE AN EXAMINER APPOINTED UNDER THE ADMINISTRATIVE PROCEDURE ACT.

The situation of the plaintiff in this cause is different from his situation in the proceedings before the Commissioner. In the latter he was in the position of an intervenor. The position of Cunningham the applicant was analogous to that of a plaintiff in a suit in court.

Pursuing this analogy further, it would seem that it would be within the province of the applicant as a "plaintiff" to have the privilege of electing to have the hearing in the Commission proceeding before an Examiner who was not appointed under the Administrative Procedure Act. It would seem to not come within the province of the intervenor to insist upon having such an Examiner.

As an intervenor he takes the case as he finds it and cannot dictate the conduct of it. His intervention must be in subordination to the proceeding. *Chandler Co.* v. *Brandtjen, Inc.,* 296

U. S. 53, 56, 57, 58; *Godfrey L. Cabot, Inc.* v. *Binney & Smith Co.*, 46 F. Supp. 346, 347.

Now, in the Commission proceeding, Cunningham did not raise any question about the lack of an Administrative Procedure Act Examiner at the hearing of his application and he hasn't since. Therefore, it might well be presumed that he waived the matter.

Further, plaintiff in this suit, L. A. Tucker Truck Lines, Inc.,
70 intervenor in the Commission proceedings, made no request of the Commission for such an Examiner and hasn't yet made one to the Commission.

CONCLUSION.

We respectfully submit that the motion to amend the complaint should be denied.

DANIEL W. KNOWLTON,
Chief Counsel.

H. L. UNDERWOOD,
Assistant Chief Counsel,
Interstate Commerce Commission.

Proceedings Before the Interstate Commerce Commission

71 SECRETARY'S CERTIFICATE—(omitted in printing).

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72 BEFORE THE INTERSTATE COMMERCE COMMISSION.

Form Approved.
Budget Bureau No. 60-R091-42.

Form BMC 74 MC.....

Application for Change or Extension of Operations—Received June 28, 1948.

(Before answering, read General Instructions on page 3)

Application of (Name) C. L. CUNNINGHAM. (Trade name) d/b/a Pemiscot Motor Freight Co. (Status as individual, partnership, association, corporation, fiduciary, etc. If a corporation, name the State of incorporation. If a partnership, give names of all partners. If an association or corporation, attach a list of names and addresses of directors and officers.) An individual. (Street address) (City) (State) Caruthersville, Missouri.

Applicant hereby applies for the appropriate authority to *(check applicable status)*:

☐ extend an operation ☐ operate over an alternate route ☐ change a route or operation ☐ engage in dual operations	as a	☐ common carrier ☐ contract carrier	of	☐ passenger ☐ property,

by motor vehicle in interstate or foreign commerce, transporting the following commodities (a property carrier of general commodities should name exceptions, if any; and a passenger carrier should name newspapers, express, mail, and/or baggage of passengers, if such property is to be transported, and should state whether baggage of passengers is to be transported in the same vehicle with passengers or in separate vehicles) GENERAL COMMODITIES, except articles of unusual value, and except dangerous explosives, household goods as defined in Practices of Motor Carriers of Household Goods, 17 MCC 467, petroleum products in bulk, and commodities requiring special equipment, and including livestock over ☐ regular or ☐ irregular routes (a common carrier of passengers should check the irregular route square *only if* the application involves special and charter operations which are *not* authorized under section 208 (*c*), Interstate Commerce Act, as incidental to operations over regular routes) from ..... to ..... as follows: (See Exhibit L Attached).

On return movements applicant proposes: ☐ to engage in the same operation; ☐ to furnish NO transportation for compensation; ☐ to transport empty containers used in the operation described above; ☐ to transport rejected shipments; and/or ☐ to transport the following commodities: .....

Intermediate and off-route points to be served which applicant is not now serving: .....

Applicant is operating at present between ..... and ..... as follows: .....

Applicant ☐ has or ☐ has not received authority from the State Board(s) to engage in intrastate commerce over the proposed route, including service to the following intermediate and off-route points: .....

A map of the proposed operation, also outlining any alternate route and any route to be changed or extended, is attached hereto and made a part hereof. Any change, interruption, or discontinuance of operations by applicant is explained by Exhibit "A", attached hereto and made a part hereof.

The proposed operation will be: ☐ year-round or ☐ seasonal between (Day and month) ..... and (Day and month) ..... approximately (Number) 1 times each (Day, week, month, or year) day, ☐ on schedule, ☐ not on schedule, ☐ on call.

Applicant proposes to use approximately (Number) 14 motor vehicles in the above-described service. 7 tractors and semi trailers, 7 delivery trucks.

Previous application(s) under part II, Interstate Commerce Act, is (are) filed under Docket No(s). MC 105120, Sub 1 and Sub 2.

73 In support of this application, applicant submits the following exhibits, attached hereto and made a part hereof:

EXHIBIT "B" showing that applicant is fit, willing, and able properly to perform the service proposed and to conform to the applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations of the Commission thereunder;

EXHIBIT "C" showing that the proposed common carrier operation is or will be required by the present or future public convenience and necessity, or that the proposed contract carrier operation will be consistent with the public interest and the national transportation policy declared in the said act.

Applicant will furnish such additional information as the Commission may request.

If the Commission assigns a formal hearing upon this application, applicant requests that it be held at (City and State) Hayti, Missouri.

Applicant will introduce approximately 25 witnesses at the hearing, and will require approximately 6 hours to present evidence.

Applicant understands that the filing of this application does not in itself constitute authority to operate.

OATH

STATE OF MISSOURI, }
COUNTY OF ——, } *ss:*

(Name of affiant) C. L. CUNNINGHAM makes oath and says that he is the (Title of affiant) owner of the (Name of applicant) Pemiscot Motor Freight Company; that he is authorized on the part of said applicant to verify and file with the Interstate Commerce Commission this application and exhibits attached thereto; that he has carefully examined all of the statements contained in such application and the exhibits attached thereto and made a part thereof; that he has knowledge of the matters set forth therein and that all such statements made and matters set forth therein are true and correct to the best of his knowledge, information, and belief; affiant further says that the applicant makes this application intending in good faith to present evidence which the applicant believes will support the application as to each of the States within which authority to operate is sought herein.

C. L. CUNNINGHAM.

Subscribed and sworn to before me, a notary public in and for the State and County above named, this 19 day of May, 1948.

JOHN S. MOSLEY,
(Seal) Notary Public.

My commission expires 3/22/52.

CERTIFICATE OF SERVICE.

A copy of this application was delivered, in person or by registered or receipted mail, to each of the following State Boards or officials:

Name of State Board	*Address*
Kimbel Truck Lines	Cape Girardeau, Missouri
Tucker Truck Lines	Cape Girardeau, Missouri
Frisco Transportation Company	St. Louis, Missouri 906 Olive St.
Highway Express, Inc.	Memphis, Tennessee P. O. Box 261
Righter Trucking Company	Charleston, Missouri
Missouri Pacific Railroad Co.	St. Louis, Missouri
St. Louis-San Francisco Railroad Co.	St. Louis, Missouri
St. Louis-Southwestern Railroad Co.	St. Louis, Missouri
Memphis Transports	Memphis, Tennessee P. O. Box 2854
Roberson Truck Lines	Poplar Bluff, Mo.
A. L. Hogan Truck Lines	Kennett, Mo.

A notice of the filing of this application, Form BMC 15 (Revised), was delivered in person or by registered or receipted mail, to the following competitors by motor vehicle, rail, or water (applicants should carefully follow the Commission's order requiring that the applicant notify each motor carrier, railroad, or water carrier, known to the applicant, with whose service the operations described in this application are or will be directly competitive):

Name of competitor	*Address*
Public Service Commission of Missouri	Jefferson City, Missouri
Public Service Commission of Arkansas	Little Rock, Arkansas
Public Service Commission of Tennessee	Nashville, Tennessee
Corporation Commission of Illinois	Springfield, Illinois

Date..... Signed C. L. CUNNINGHAM.

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74 **Exhibit 1 to Application.**

ROUTE No. 1:

From points and places within the St. Louis, Mo.—East St. Louis, Ill. Commercial Zone, as described in ICC 1 MCC 656 and 2 MCC 285:

(a) over city streets to Illinois State Highway 3 in East St. Louis, Illinois, thence over Illinois State Highway 3 to Cairo, Illinois;

(b) over city streets to Illinois State Highway 13 in East St. Louis, Illinois, thence over Illinois Highway 13 to Belleville, Illinois, thence over Illinois State Highway 159 to Red Bud, Illinois, thence over Illinois State Highway 3 to Cairo, Illinois;

ROUTE No. 2:

From Chester, Illinois, as shown in Route 1 (a) above, over Missouri Highway 51 to Perryville, Missouri, thence over Missouri State Highway 25 to junction Missouri State Highway 55 at Blomeyer, Missouri, thence over Missouri State Highway 55 to junction U. S. Highway 61, near Morley, Missouri;

ROUTE No. 3:

From McClure, Illinois, over Illinois State Highway 146 connecting with Route No. 1 above, to Cape Girardeau, Missouri, thence over Missouri State Highway 74 to junction U. S. Highway 61, thence over U. S. Highway 61, to Blytheville, Arkansas, and return over said routes serving all points on U. S. Highway 61 from Sikeston, Missouri, to Blytheville, Arkansas, including Sikeston, and including all intermediate and off-route points in New Madrid and Pemiscot Counties, Missouri;

ROUTE No. 4:

Between Points in Pemiscot, County, Missouri, Sikeston, Missouri, and Portageville, Missouri, on the one hand, and, on the other hand, Memphis, Tennessee, traversing U. S. Highway 61 from Blytheville, Arkansas, to Memphis, Tennessee, for operating purposes only and limited to shipments by applicants between Memphis, Tennessee, and the above specified Missouri points only;

ROUTE No. 5:

Between Cairo, Illinois, and Arkansas-Missouri State Line,

From Cairo, Illinois over U. S. Highway 60 to Sikeston, Missouri, thence over U. S. Highway 61 to Hayti, Missouri, thence over Missouri Highway 84 to Kennett, Missouri, thence over Missouri Highway 25 to Arkansas-Missouri State Line, and return serving Sikeston and all points and places in Pemiscot and New Madrid Counties, Missouri, and the off-route points of Clarkton, Holcomb and Hornersville, Missouri.

No service to be performed from St. Louis, Missouri to Memphis, Tennessee, or from Memphis, Tennessee to St. Louis, Missouri.

75 **Exhibit "A" to Application.**

(a) Applicant has had many years of experience in the transportation business and all of his employees are experienced. The granting of this application will more or less be the *converting* of an irregular route carrier to that of a regular route common carrier in the same territory and serving practically the same points.

(b) Applicant owns 7 trucks and 7 tractors and semi-trailers with which to perform service, all in good operating condition and meeting the requirements of the rules and regulations of the commission as well as the laws pertaining thereto.

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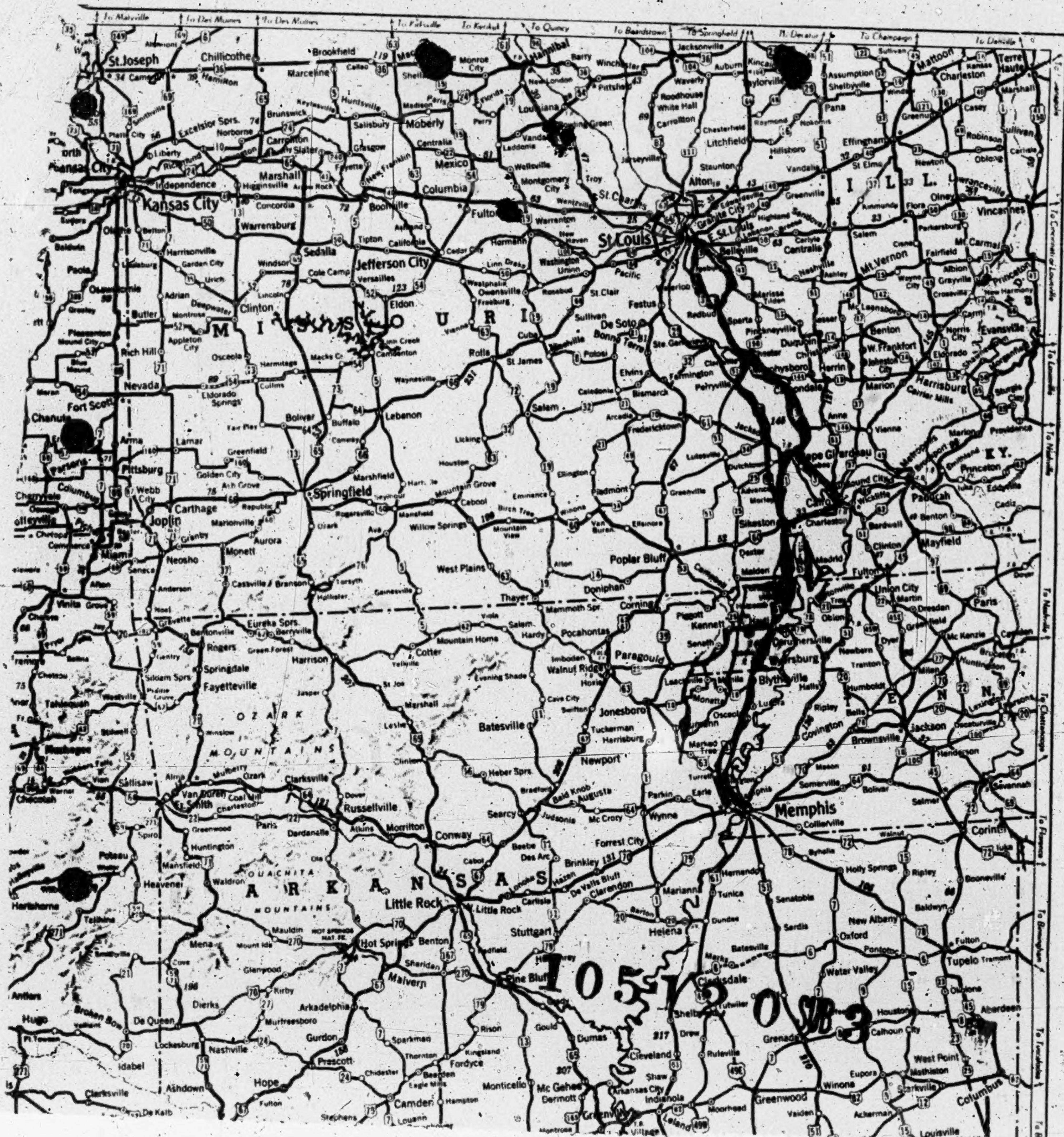
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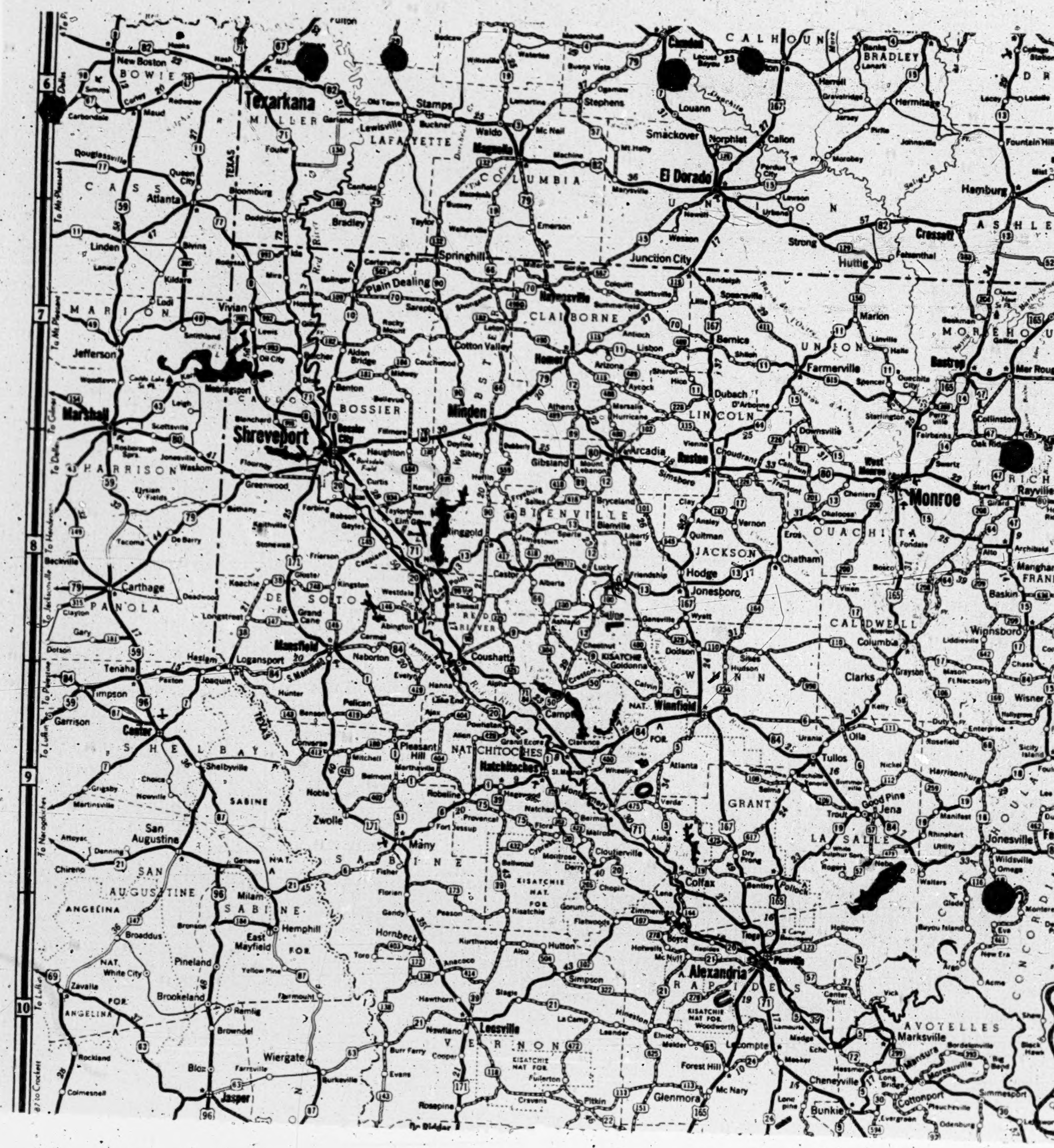
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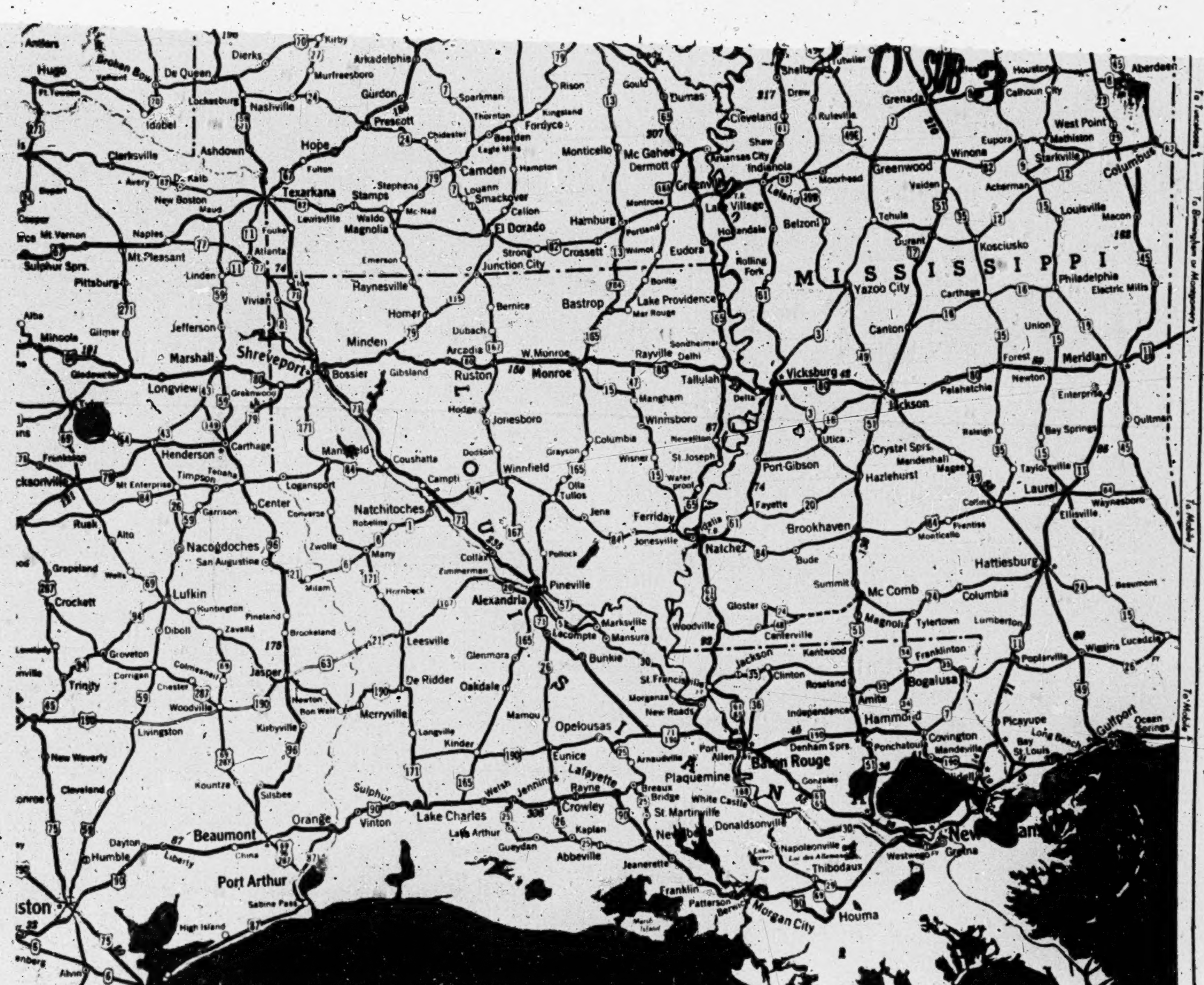
MISSISSIPPI
Shreveport
Vicksburg
Jackson
Baton Rouge
Beaumont
Port Arthur

(P.61)


Alexandria
Lake Charles
Lafayette
Beaumont
Port Arthur

(P.62)

78 BEFORE INTERSTATE COMMERCE COMMISSION

JOHN S. MOSBY.
Attorney at Law
Lepanto, Arkansas

August 12, 1948

Mr. W. Y. Blanning, Director
Bureau of Motor Carriers
Interstate Commerce Commission
Washington 25, D. C.

Re: O-431 MC 105120 Sub 3
C. L. Cunningham d/b/a
Pemiscot Motor Freight Co.

Dear Sir:

With reference to your letter of the 26th. it is the desire of the applicant *to include livestock* with his authority for general commodities.

It is the applicants intention to convert his operations to that of a regular route carrier and if the regular route operation is approved it is his desire that irregular route certificates Nos. Mc-105120 and Subs 1 and 2 be revoked. The routes in the instant application are practically identical with the irregular route authority that he now holds.

Enclosed you will please find Exhibit 1, as amended, with certificate of service.

In view of the harvest season now being upon this section of the country we want again to request that the *hearing* be set for *Hayti, Missouri*, othewise we are afraid that we will not be able to persuade our witnesses to leave their business to testify in the case.

Yours very truly,

jsm/j
cc C. L. CUNNINGHAM

JOHN S. MOSBY.

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79 BEFORE THE INTERSTATE COMMERCE COMMISSION

DOCKET NO. MC-105120 SUB 3

In the Matter of the Application of C. L. Cunningham, d/b/a Pemiscot Motor Freight Co., Caruthersville, Missouri

Amendment to Application—received August 17, 1948.

Comes the Applicant, C. L. Cunningham, d/b/a Pemiscot Motor Freight Co., and prays leave to amend the Application herein filed by amending EXHIBIT 1 as follows:

EXHIBIT 1

REGULAR ROUTE

Route No. 1

Between East St. Louis and Cairo, Illinois,

From East St. Louis, Illinois over Illinois Highway 3 to Cairo, Illinois, and return over the same route.

From East St. Louis, Illinois, over Illinois Highway 13 to Belleville, Illinois, thence over Illinois Highway 159 to Red Bud, Illinois, thence to Cairo as specified above, and return over the same route.

Serving points and places in the St. Louis, Missouri-East St. Louis, Illinois Commercial Zone, 1 M. C. C. 656 and 2 M. C. C. 285, as intermediate and off-route points.

Route No. 2

Between Chester, Illinois and the junction Missouri Highway 55 and U. S. Highway 61.

From Chester, Illinois, over Missouri Highway 51 to Perryville, Missouri, thence over Missouri Highway 25 to junction Missouri Highway 55 at Jackson, thence over Missouri Highway 55 to junction U. S. Highway 61 near Morley, Missouri, and return over the same route.

Serving no intermediate points.

Route No. 3

Between McClure, Illinois and Blytheville, Arkansas.

From McClure, Illinois, over Illinois Highway 146 to Cape Girardeau, Missouri, thence over Missouri Highway 74 to junction U. S. Highway 61, thence over U. S. Highway 61 to Blytheville, Arkansas, and return over the same route.

Serving all intermediate points on U. S. Highway 61 between Sikeston, Missouri, including Sikeston, and Blytheville, Arkansas, and all points and places in New Madrid and Pemiscot Counties, Missouri as off-route points.

Route No. 4

Between Sikeston, Missouri and Memphis, Tennessee.

From Sikeston, Missouri, over U. S. Highway 61 to Memphis, Tennessee, and return over the same route.

Serving, Sikeston, Missouri, Portageville, Missouri, and Memphis, Tennessee, and all points and places in Pemiscot County, Missouri as off-route points.

Restricted to shipments between Memphis, Tennessee, and the specified Missouri points only.

Route No. 5

Between Cairo, Illinois and Arkansas-Missouri State Line.

From Cairo, Illinois, over U. S. Highway 60 to Sikeston, Missouri, thence over U. S. Highway 61 to Hayti, Missouri, thence over Missouri Highway 25 to the Arkansas-Missouri State Line, and return over the same route.

Serving the intermediate point of Sikeston, and the off-route points of Clarkton, Holcomb and Hornersville, Missouri, and all points and places in Pemiscot and New Madrid Counties, Missouri, as off-route points.

No service to be performed from St. Louis, Missouri, to Memphis, Tennessee, or from Memphis, Tennessee to St. Louis, Missouri, on the above described routes.

That said Exhibit 1 as above amended will clarify the description of the routes proposed to be served by the application.

C. L. Cunningham, d/b/a
Pemiscot Motor Freight Co.
By JOHN S. MOSBY,
Attorney of Record.

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81 CERTIFICATE OF SERVICE

A copy of this amendment to Application was delivered by registered mail to each of the State Boards shown on Page 2 of the original Application and a copy was also delivered by registered mail to each of the competitors to whom Form BMC 15 was delivered as also shown on Page 2 of said oringinal Application.

Dated this August 12, 1948.

JOHN S. MOSBY,
Attorney for Applicant.

82-93 RECOMMENDED REPORT AND ORDER OF JUNE 20, 1949. Omitted. Printed side page, 16 ante.

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94 BEFORE INTERSTATE COMMERCE COMMISSION

No. MC-105120 (Sub-No. 3)

C. L. CUNNINGHAM EXTENSION—MISSOURI AND OTHER STATES
Caruthersville, Mo.

Order

In the matter of request for postponement of date for the filing of exceptions to the recommended order.

Present:

WILLIAM E. LEE, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

Upon consideration of the record in the above-entitled case and upon consideration of said request:

It is ordered, That the date for the filing of exceptions to the recommended order of the examiner be, and it is hereby, extended to August 11, 1949.

Dated at Washington, D. C., this 7th day of July, A. D., 1949.
By the Commission, Commissioner Lee.

W. P. BARTEL,
Secretary.

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95 BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC 105120, Sub. 3.

C. L. CUNNINGHAM d/b/a Pemiscot Motor Freight Company

Exceptions of L. A. Tucker Truck Lines, Inc., Viking Freight Company, Gordons Transports Inc., Superior Forwarding Company, Righter Trucking Company, Gordons Transports Inc., Superior Forwarding Company, J. F. Walsh D/B/A Walsh Freight Lines and A. L. Hogan D/B/A Hogan Truck Lines, Intervenors in Opposition, to Report and Order Recommended by C. I. Kephart, Examiner—Filed August 10, 1949.

B. W. LATOURETTE,
Attorney,
314 North Broadway,
St. Louis 2, Missouri.

Dated at St. Louis, Missouri, August 8, 1949.
Due August 11, 1949.

96 STATEMENT.

In many years of practice before this Commission we have not before been confronted with such a confused and indefinite statement of authority sought as is shown by this record. We respectfully request that the record be carefully searched on this point and at the same time a careful review of the authority presently held by the applicant be made. It appears from this record that

two propositions are involved (1) a conversion of presently authorized irregular route operations to regular route operations and (2) authority to serve certain additional points not now included in applicant's certificate. It is thought desirable at the outset to describe the authority presently held by the applicant under certificates No. MC 105120, Sub 1 and 2. The following is an exact reproduction of the operating authority contained therein:

MC 105120

General commodities, except articles of unusual value, and except dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M. C. C. 467, petroleum products in bulk, and commodities requiring special equipment, over irregular routes,

Between points and places in the *St. Louis, Mo.-East St. Louis, Ill., Commercial Zone,* as defined by the Commission in 1 M. C. C. 656, and 2 M. C. C. 285, on the one hand, and, on the other Portageville, Mo., and all points in Pemiscot County, Mo.

MC 105120 Sub. 1

General commodities, except those of unusual value, dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M. C. C. 467, petroleum products in bulk, and commodities requiring special equipment, over irregular routes.

97 Between points and places in Pemiscot County, Mo., Sikeston, Mo., and Portageville, Mo., on the one hand, and, on the other, Memphis, Tenn., traversing Arkansas for operating convenience only.

RESTRICTION: The service authorized herein is limited to the transportation of shipments by said carrier between Memphis and the above-specified Missouri points only.

MC 105120 Sub. 2

General commodities, except those of unusual value, and except dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M. C. C. 467, petroleum products in bulk, and commodities requiring special equipment, over irregular routes,

Between Cairo, Ill., on the one hand, and, on the other, points and places in Pemiscot County, Mo., and Portageville, Marston, Conran, Lilbourn, Risco, Parma, Catron, New Madrid, Kewanee, Matthews, Kennett, Caruth, Hornersville, Senath, Arbyrd, and Cardwell, Mo.

The order of the Commission dated January 4, 1949 assigning this case for hearing describes the authority sought as follows:

General commodities, except articles of unusual value, and except dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M. C. C. 467, petroleum products in bulk, and commodities requiring special equipment,

Between East St. Louis and Cairo, Ill.,

From East St. Louis over Illinois Highway 3 to Cairo, and return over the same route.

From East St. Louis, Ill., over Illinois Highway 13 to Belleville, Ill., thence over Illinois Highway 159 to Red Bud, Ill., thence to Cairo as specified above, and return over the same route.

98 Serving points and places in the ST. LOUIS, MO.-EAST ST. LOUIS, ILL., COMMERCIAL ZONE, 1 M. C. C. 656 and 2 M. C. C. 285, as intermediate and off-route points.

Between Chester, Ill., and the junction Missouri Highway 55 and U. S. Highway 61.

From Chester over Missouri Highway 51 to Perryville, Mo., thence over Missouri Highway 25 to junction Missouri Highway 55 at Jackson, thence over Missouri Highway 55 to junction U. S. Highway near Morley, Mo., and return over the same route.

Serving no intermediate points.

Between McClure, Ill., and Blytheville, Ark.

From McClure, Ill., over Illinois Highway 146 to Cape Girardeau, Missouri, thence over Missouri Highway 74 to junction U. S. Highway 61, thence over U. S. Highway 61 to Blytheville, and return over the same route.

Serving all intermediate points on U. S. Highway 61 between Sikeston, Mo., including Sikeston, and Blytheville, Ark., and all points and places in New Madrid and Pemiscot Counties, Missouri as off-route points.

Between Sikeston, Mo., and Memphis, Tenn.,

From Sikeston over U. S. Highway 61 to Memphis, and return over the same route.

Serving Sikeston and Portageville, Mo., and Memphis, Tenn., and all points and places in Pemiscot County, Mo., as off-route points.

Restricted to shipments between Memphis, Tenn., and the specified Missouri points only.

Between Cairo, Ill., and Arkansas-Missouri State line,

From Cairo over U. S. Highway 60 to Sikeston, Mo., thence over U. S. Highway 61 to Hayti, Mo., thence over Missouri Highway 84 to Kennett, Mo., thence over Missouri Highway 25 to the Arkansas-Missouri State line,

and return over the same route.

99 Serving the intermediate point of Sikeston, and the off-route points of Clarkton, Holcomb and Hornersville, Mo., and all pionts and places in Pemiscot and New Madrid Counties, Mo., as off-route points.

No service to be performed from St. Louis, Mo., to Memphis, Tenn., or from Mephis, Tenn., to St. Louis, Mo., on the above-described routes.

(Applicant states that it is his intention to convert his operations to that of a regular-route carrier and if the regular-route operation is approved, it is his desire that irregular-route certificates in Nos. MC-105120 and Subs 1 and 2 be revoked.)

At sheets 9 and 10 the examiner recommends applicant be authorized to operate over routes numbered 1 to 5 inclusive described as follows:

(1) Between East St. Louis, Ill., and Cairo, Ill., over Illinois Highway 3 via Red Bud, Ill., (also from East St. Louis over Illinois Highway 13 to Belleville, Ill., and thence over Illinois Highway 159 to Red Bud and thence as specified above to Cairo) and return over either route, serving points in the St. Louis, Mo.,-East St. Louis commercial zone, as defined by the Commission, as intermediate or off-route points; with service at the intermediate points of Chester and McClure, Ill., and the terminus of Cairo restricted to joinder only with routes 2, 3, and 4 below.

(2) Between Chester, Ill., and junction of Missouri Highway 55 and U. S. Highway 61, from Chester across the Mississippi River and over Missouri Highway 51 to Perryville, Mo., thence over Missouri Highway 25 to Jackson, Mo., and thence over Missouri Highway 55 to junction with U. S. Highway 61 near Morley, Mo., and return over the same route, serving no intermediate points; with service at the termini restricted to joinder only.

(3) Between McClure, Ill., and junction of U. S. Highway 61 and Missouri-Arkansas State line, from McClure over Illinois Highway 146 to and thence across the Mississippi River to Cape Girardeau, Mo., thence over Missouri Highway 74 to junction with U. S. Highway 61, and thence over U. S. Highway 61 to the said State line and return over the same route, serving Sikeston, Mo., and all points on U. S. Highway 61 south thereof, as intermediate points and all other points in New Madrid and Pemiscot Counties, Mo., as off-route points; with service at McClure restricted to joinder

100 only.

(4) Between Cairo, Ill., and junction of Missouri Highway 25 and Missouri-Arkansas State line, from Cairo over U. S. Highway to Sikeston, Mo., thence over U. S. Highway 61 to Hayti, Mo., thence over Missouri Highway 84 to Kennett, Mo., and thence over Missouri Highway 25 to the said State line and return over the same route, serving Sikeston, points in New Madrid and Pemiscot Counties, and those located in Dunklin County on and south of Missouri Highways 84 and 90 as intermediate or off-route points.

(5) Between Sikeston, Mo., and Memphis, Tenn., over U. S. Highway 61, serving Portageville, Mo., as an intermediate point and points in Pemiscot County, Mo., as intermediate or off-route points.

Restriction applicable to all routes:

No service to be performed between the St. Louis-East St. Louis commercial zone and Memphis by any combination of routes authorized herein.

It will be readily apparent that by authorizing joinder of route 1 with routes 3 and 4 the examiner has recommended applicant be authorized to conduct operations between East St. Louis, Ill., and Sikeston, Mo., and all points on U. S. Highway 61 south of Sikeston to the Mo.-Ark. State line and to all points in New Madrid and Pemiscot Counties, Mo., and those located in Dunklin County, Mo., on and south of Missouri Highways 84 and 90. Points in the *St. Louis, Mo.,-East St. Louis, Ill., Commercial Zone* as defined by the Commission would also be authorized to be served as intermediate and off-route points.

As we have heretofore shown applicants present authority in certificate No. MC 105120 is limited to authorize operations between points and places in the *St. Louis, Mo.,-East St. Louis, Ill., Commercial Zone*, as defined by the Commission, on the one hand, and, on the other, Portageville, Mo., and all points and places in Pemiscot
County, Mo. The Northern boundary line of Pemiscot
101 County crosses U. S. Highway 61 at a point immediately
south of Portageville, Mo., which is New Madrid County. Thus the effect of the recommended report and order is to grant new authority to the applicant to conduct operations between points in the *St. Louis, Mo.,-East St. Louis, Ill., Commercial Zone* on the one hand, and, on the other, to the very important Southeast Missouri city of Sikeston located in New Madrid County on U. S. Highway 61 (shown by this record to be adequately served by existing carriers) and to points south thereof such a Matthews, Kewanee, New Madrid, Lilbourn and Marston and any other Missouri points located on U. S. Highway 61 between and including Sikeston and but not including Portageville also located in

New Madrid County, all of which points are shown by this record to be adequately served. In fact new authority is recommended to serve all other points in New Madrid County since applicant's present authority is limited to points in Pemiscot County except for Portageville which is located in New Madrid County. Further a new grant of authority is recommended to operate between the *St. Louis, Mo.,-East St. Louis, Ill., Commercial Zone* on the one hand, and, on the other, points in Dunklin County, Mo. Such a grant of authority would permit applicant to operate between points in the *St. Louis, Mo.,-East St, Louis, Ill., Commercial Zone* on the one hand, and, on the other such cities as Kennett, Caruth, Senath, Cardwell, Arbyrd, Hornersville, Holcomb and Clarkton as well as to all other points in Dunklin County, Mo., on and south of Missouri Highways 84 and 90. Applicant does not at present hold any authority to operate either to, from or between the *St. Louis, Mo.,-East St. Louis, Ill., Commercial Zone* and points in Dunklin County, Mo.

Under route 4 the examiner recommends applicant be authorized to operate between Cairo, Ill., and the junction of Missouri Highway 25 and the Mo.-Ark. State line serving Sikeston, Mo.,
102 (located on U. S. Highway 61), points in New Madrid and Pemiscot Counties, and those located in Dunklin County on and south of Missouri Highways 84 and 90.

As heretofore shown applicant's present authority to and from Cairo, Ill., is set forth in Certificate MC 105120 Sub 2 as follows:

> Between Cairo, Ill., on the one hand, and on the other, points and places in Pemiscot County, Mo., and Portageville, Marston, Conran, Lilbourn, Risco, Parma, Catron, New Madrid, Kewanee, Matthews, Kennett, Caruth, Hornersville, Senath, Arbyrd, and Cardwell, Mo.

Thus to the extent the recommended report and order recommends a grant of authority beyond the scope of that above described it recommends new authority. With respect to operations to and from Cairo, Ill., the examiner recommends a grant of authority beyond the scope of the amendment to the application offered by applicant and allowed over the objections of these interveners Tr. 59, 60. Applicant's counsel stated it was desired to amend the application insofar as route 5 is concerned to seek authority to serve from Cairo, Ill., points located in Dunklin County presently authorized to be served in MC 105120 Sub 2, Tr. 59. The only points lying in Dunklin County are Kennett, Caruth, Hornersville, Senath, Arbyrd and Cardwell. Thus the amendment offered limits the application so as to seek authority to serve only the aforenamed points to and from Cairo, Ill. While the foregoing summary is rather lengthy we felt it necessary in view of the confused state of the record with respect to the authority presently held and that sought by the applicant. We will proceed

now to a discussion of our exceptions to the recommended report and order of the examiner.

EXCEPTIONS:

Exceptions are taken to the following findings of the
103 examiner at Sheets 9 and 10.

"Accordingly, the examiner finds that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, except articles of unusual value, dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467, articles requiring special equipment, commodities in bulk, and those injurious or contaminating to other lading, between the points and over the routes described below:

(1) Between East Louis, Ill., and Cairo, Ill., over Illinois Highway 3 via Red Bud, Ill., (also from East St. Louis over Illinois Highway 13 to Belleville, Ill., and thence over Illinois Highway 159 to Red Bud and thence as specified above to Cairo) and return over either route, serving points in the St. Louis, Mo.,-East St. Louis commercial zone, as defined by the Commission, as intermediate or off-route points; with service at the intermediate points of Chester and McClure, Ill., and the terminus of Cairo restricted to joinder only with routes 2, 3, and 4 below.

(2) Between Chester, Ill., and junction of Missouri Highway 55 and U. S. Highway 61, from Chester across the Mississippi River and over Missouri Highway 51 to Perryville, Mo., thence over Missouri Highway 25 to Jackson, Mo., and thence over Missouri Highway 55 to junction with U. S. Highway 61 near Morley, Mo., and return over the same route, serving no intermediate points; with service at the termini restricted to joinder only.

(3) Between McClure, Ill., and Junction of U. S. Highway 61 and Missouri-Arkansas State line, from McClure over Illinois Highway 146 to and thence across the Mississippi River to Cape Girardeau, Mo., thence over Missouri Highway 74 to junction with U. S. Highway 61, and thence over U. S. Highway 61 to the said State line and return over the same route, serving Sikeston, Mo., and all points on U. S. Highway 61 south thereof, as intermediate points and all other points in New Madrid and Pemiscot Counties, Mo., as off-route points; with service at McClure restricted to joinder only.

(4) Between Cairo, Ill., and junction of Missouri Highway 25 and Missouri-Arkansas State line, from Cairo over U. S. Highway 60 to Sikeston, Mo., thence over U. S. Highway 61 to Hayti, Mo., thence over Missouri Highway 84 to Kennett, Mo., and thence over Missouri Highway 25 to the said State line and return over the same route, serving Sikeston, points in New Madrid and Pemiscot Counties, and those located in Dunklin County on and south of Missouri Highways 84 and 90 as intermediate or off-route points.

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(5) Between Sikeston, Mo., and Memphis, Tenn., over U. S. Highway 61, serving Portageville, Mo., as an intermediate point and points in Pemiscot County, Mo., as intermediate or off-route points.

Restriction applicable to all routes:

No service to be performed between the St. Louis-East St. Louis commercial zone and Memphis by any combination of routes authorized herein.

"The examiner further finds that applicant is fit, willing and able properly to perform such service and to conform to the provisions of the Interstate Commerce Act and the Commission's rules and regulations thereunder, that a certificate authorizing such operations should be granted upon the return by applicant of his present certificate or certificates with request for cancellation of same, and that the application in all other respects should be denied."

PUBLIC WITNESSES.

Applicant produced 10 public witnesses as follows: 2 from [a] Portageville, Mo.; 1 from [a] Steele, Mo. (located in Pemiscot County); 1 from [a] Caruthersville, Mo. (located in Pemiscot County); 1 from [b] New Madrid, Mo. (located in New Madrid County); 1 from [b] Parma, Mo. (located in New Madrid County); 1 from [c] Sikeston, Mo. (located in New Madrid County); 1 from Blytheville, Ark.; and 2 from Gideon, Mo.

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[a] Presently authorized to be served by applicant over irregular routes to and from St. Louis, Cairo and Memphis.

[b] Presently authorized to be served by applicant over irregular routes to and from Cairo.

[c] Presently authorized to be served by applicant over irregular routes to and from Memphis.

The Issue as to Proposed Service to Portageville, Steele and Caruthersville, Mo.

Since applicant presently is authorized to serve Portageville, Steele and Caruthersville, Mo., on traffic moving to and from St. Louis, Cairo and Memphis over irregular routes the issue as to those points is whether applicant has made out its case for a conversion of its irregular route operations to regular route operations.

As we have previously pointed out 2 public witnesses testified with respect to that part of the application relating to Portageville, Mo., as a point to be served. Witness Whittaker testified he is engaged in the retail hardware and furniture business at Portageville and has used applicant's service from St. Louis, Cairo and Memphis, Tr. 87. There is no testimony by this witness as to any use of or need for applicant's service from Portageville to St. Louis, Cairo and Memphis. He receives at Portageville between 1500 and 2,000 pounds of freight daily, 50% of which moves from St. Louis (10% of this tonnage originates beyond St. Louis), 25% from Cairo and 25% from Memphis, Tr. 89, 90. The witness had no complaint to make as to the service of existing carriers operating in interstate commerce over regular routes from St. Louis, Cairo and Memphis to Portageville, Mo., Tr. 91, 92.

Witness McCrate testified he is engaged in the farm equipment business at Portageville, Mo. Freight charges paid to rail and motor carriers in the last fiscal year amounted to $4200.00, Tr. 100, 105. Shipments are received from St. Louis, Memphis and Louisville, Tr. 100. Neither the services of Gordon Transports Inc., or Memphis Transports have been used, Tr. 100. Services of L. A. Tucker Truck Lines have been used and found to be satisfactory, Tr. 101. The big majority of the farm equipment moves by rail. It originates at the factories, is shipped to a distributor in St. Louis and is shipped by the distributor in small portions to dealers by rail to Cape Girardeau and Dexter where it is picked up by the witness' truck, Tr. 102, 103. Shipments from Louisville move through Memphis and are delivered by Highway Express and Pemiscot Motor Freight, Tr. 104. The witness admitted that if there was a limitation of the service of applicant the existing regular route carrier services would be adequate, Tr. 106. The witness further stated he did not question the adequacy of the service of Gordons Transport, Inc. and Memphis Transport from St. Louis and Memphis to Portageville, Mo., Tr. 108. There is no testimony by this witness as to any use of or need for applicant's service from Portageville, Mo., to St. Louis, Cairo or Memphis.

Witness Clark of Steele, Mo., was totally unfamiliar with the existing carrier facilities for the transportation of traffic to and

from Steele, Mo. Tr. 109. No complaint of existing carrier service is made.

Witness Dillman of Caruthesville, Mo., made no complaint as to the services of carriers presently authorized to serve that point, Tr. 115, 120.

The Issue as to Proposed Service to New Madrid, Mo.

Applicant's authority to serve New Madrid, Mo., is limited to traffic moving to and from Cairo, Ill. over irregular routes. Obviously any freight transported by applicant from St. Louis would have moved in intrastate commerce, Tr. 125. Witness Ramsburgh engaged in the farm equipment business at New Madrid testified his shipments from St. Louis are handled by rail car and in the same manner, as described by Witness McCrate, Tr. 125. Service by L. A. Tucker Truck Lines from Cairo, Ill., is satis-
107 factory, Tr. 127. No shipments are received from Memphis, Tr. 126. There is no testimony by this witness of any use of or needs for applicant's service from New Madrid, Mo., to either St. Louis, Cairo, or Memphis. Since no need is shown for additional carrier facilities for the transportation of property from St. Louis, Cairo and Memphis, the issue here is whether applicant has made out a case for the conversion of its irregular route operations from Cairo, Ill., to New Madrid, Mo., to regular route operations.

Proposed Operations to Sikeston Involve Conversion of Irregular Route Operations from Memphis to that of Regular Route and Institution of New Service from St. Louis and Cairo to Sikeston.

As we have previously shown applicant presently has no authority between St. Louis and Cairo on the one hand, and, on the other Sikeston. The examiner recommends such authority be granted, solely, we think, through a misunderstanding and not because of any evidence in the record showing the existing facilities to be inadequate. He further recommends a conversion from irregular to regular routes of the authority of applicant between Memphis and Sikeston.

Only 1 public witness, R. B. Bowman, testified in support of applicant's request for authority to serve Sikeston. At the outset we point out that the witness testified that in instances where applicant's service was used such use was confined to the transportation of shipments from Memphis to Sikeston, Tr. 136. No complaint is made by the witness as to the service of carriers having authority to operate over regular routes between Memphis and Sikeston, Tr. 138-140. There is no testimony of any need for or use of applicant's service from Sikeston to St. Louis, Cairo or Memphis.

108 Proposed Service to Gideon, Mo.

2 public witnesses testified with respect to proposed service to Gideon, Mo., located in New Madrid County, Mo. None of these interveners serve Gideon, Mo., and no discussion of this particular portion of the application is necessary on our part.

EXCEPTIONS PARTICULARIZED.

Grant of New Authority to Serve Points Not Now Authorized to be Served by Applicant.

This record shows that there are adequate existing facilities at all points on U. S. Highway 61 in Missouri and Arkansas as to which the Examiner has recommended new authority be granted the applicant.

L. A. Tucker Truck Lines, Inc. holds Certificate No. MC-3062 and Sub. 5 to that certificate describes the authorized operations of this carrier which are pertinent to this application. Daily overnight service is performed over regular routes between both St. Louis and Cairo, and Portageville, Marston, New Madrid, Canalou, Matthews, Lilbourn and Sikeston and all intermediate points between Portageville and Sikeston. This carrier owns and operates 32 trailers, 26 tractors and 14 pickup and delivery trucks and has 84 employees. It maintains terminals with an office force and pickup and delivery service at St. Louis, Cairo, Sikeston, New Madrid and has a station point with telephone at Portageville, Tr. 187, 188. It has had no complaint as to the character of service presently being rendered the shipping public on its regular routes, Tr. 189. This fact is substantiated by the testimony of the public witnesses who appeared at the hearing.

J. F. Walsh d/b/a Walsh Freight Lines holds authority under docket No. MC-110647 from St. Louis, Mo., over U. S. Highway No. 3 to Ware, Ill., U. S. Highway 146 to Cape Girardeau,
109 Mo., U. S. Highway 61 to Sikeston, Mo., U. S. Highway 60 to Dexter, Mo., Missouri Highway 25 to Mo.-Ark. State line, Arkansas Highway 25 to Paragould, Ark., Arkansas Highway No. 1 to Jonesboro, Ark., U. S. Highway 63 to Turrell, Ark., U. S. Highway 61 to West Memphis, Ark., and U. S. Highway 70 to Memphis, Tenn., with authority to serve all intermediate points from Dexter, Mo. to the Mo.-Ark. State line in Missouri. This carrier has authority to serve Arbyrd, Cardwell, Caruth, Kennett and Senath, Missouri all located in Dunklin County, Mo., which are new points recommended by the Examiner to be served by the applicant. Operations are on a daily schedule with overnight service, Tr. 194, 195. Terminals are maintained at St. Louis, Malden and Kennett, Mo., Jonesboro, Ark. and Memphis, Tenn. 14 tractors and 14 trailers are operated and the company has

approximately 35 employees, Tr. 196. This carrier has competition from Hogan Truck Service at such points as Arbyrd, Cardwell, Caruth, Kennett and Senath in addition to several other carriers serving those points, Tr. 196.

Memphis Transports, Inc. holds certificate No. MC 105487 authorizing operations between St. Louis and Memphis over Illinois Highway 3 to junction U. S. Highway 146, thence over U. S. Highway 146 to Cape Girardeau, Mo., to junction U. S. Highway 61, thence over U. S. Highway 61 to Memphis with authority to serve all intermediate points on said highways, Tr. 198. Terminals are maintained at St. Louis and Memphis and daily overnight service is performed at all points authorized to be served, Tr. 199.

Gordons Transport, Inc. holds authority under Certificate MC-11220 authorizing operations insofar as pertinent here between St. Louis and Memphis using routes through Illinois to reach Cape Girardeau, Mo., from which point its route extends from U. S. Highway 61 to Memphis, Tenn. It has authority to serve
110 Sikeston, Mo. and all points intermediate between Sikeston and Memphis on U. S. Highway 61. Daily overnight schedules are maintained on its routes. Terminals are maintained in Chicago, Ill., St. Louis, Mo., Memphis, Tenn., Jackson, Miss, and New Orleans, La., Tr. 202-204.

A. L. Hogan d/b/a Hogan Truck Lines holds certificate No. MC-106196 authorizing operations from St. Louis over Illinois Highway 13 to Belleville, Ill., Ilinois Highway 159 to Red Bud, Ill., Illinois Highway 3 to Chester, Ill., thence across the Mississippi River reaching Missouri Highway 51 and traversing that highway to Perryville, Mo., thence over Missouri Highway 25 to Kennett, Mo., thence over Missouri Highway 84 from Kennett to Hayti, Mo. and U. S. Highway 61 to Memphis. This carrier is authorized to serve the points of Kennett, Caruth, Senath, Cardwell, Arbyrd, Hornersville, Holcomb and Clarkton. These points are all located in Dunkin County and covered by a grant of new authority recommended by the Examiner, Tr. 208. Daily overnight service is performed by this carrier over its regular routes.

It is clear from this record that there is no basis for the grant of new authority, which we previously point out is recommended by the Examiner. The record clearly shows the existing carriers have adequate facilities to perform all transportation service necessary to meet the needs of the shipping pubic in the area covered by a grant of new authority as recommended by the Examiner.

Conversion of Irregular Route Operations to Regular Route Operations.

There is no evidence in this record of any deficiency in the service performed by regular route common carriers in the territory
111 presently authorized to be served by them. All of the public witnesses uniformly agree that such services are entirely adequate and that their needs would be adequately met even though the applicant did not conduct regular route operations. The only other testimony offered by the applicant in support of a conversion of its operations was the fact that he had been performing a daily service, which of course is strictly a self-serving statement and is evidence which cannot be considered by the Commission as any proof of public convenience and necessity. The record shows our objection to receipt of such evidence and we again renew the same. Applicant did have in the hearing room certain freight bills which it was testified illustrated its operations. It was not shown by applicant that these bills represented operations between any particular points and obviously such testimony can be given very little weight in this proceeding. We contend that the applicant has the burden of proving that the existing facilities are inadequate before the Commission can authorize a conversion of the irregular route operations to regular operations. These interveners have shown that they at the present time have idle equipment. That additional tonnage could be handled. That competition in the smaller cities, Sikeston and South thereof, is very keen and that conversion of the present authority of the applicant to a regular route authority will increase that competition, Tr. 189, 190, 196, 199, 203, 204.

In *Royal Cadillac Service, Inc.*, 34 M. C. C., 787, the Commission had before it a situation where the applicant sought authority to convert an irregular route operation to one over regular routes. As in the instant case the applicant represented that it had engaged in regular route operations although its authority
112 was confined to operations over an irregular route. The Commission held that even though the said operations appeared to have been successful the volume of traffic handled was not a reliable indication of public convenience and necessity for the service, 1c 795. The Commission went on to say:

> "We have consistently held that, where authority is sought to engage in motor-carrier operations, and to serve a portion of the public already served by other carriers, the burden is upon applicant to show that such carriers are not rendering a type or character of service which satisfies the public need, and that the proposed service will tend to correct or substantially improve that condition. Other than a showing of the results of its past operations, there is no substantial

evidence in the present record of any public need for continuance of applicant's service. Existing carriers appear to be fully able to accommodate the passenger traffic moving between New York City and the resort area, and we are of the view that the application should be denied."

There is no basis in this record for a conversion of applicant's irregular route authority as requested.

CONCLUSION.

The request for authority to serve new and additional points should be denied on the ground that the existing carrier facilities are shown to be adequate and the request for authority to convert applicant's irregular route opeartions to regular route oper-
113 ations should also be denied on the same grounds.

Respectfully submitted,

B. W. LATOURETTE,
314 North Broadway,
St. Louis 2, Missouri,
Attorney for L. A. Tucker Truck Lines, Inc., Viking Freight Company, Righter Trucking Company, Gordons Transports Inc., Superior Forwarding Company, J. F. Walsh d/b/a Walsh Freight Lines, A. L. Hogan d/b/a Hogan Truck Lines.

CERTIFICATE OF SERVICE.

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing by first-class mail a copy thereof properly addressed to each other party.

Dated at St. Louis, Missouri this 8th day of August, 1949.

B. W. LATOURETTE.

114 BEFORE THE INTERSTATE COMMERCE COMMISSION

No. MC 105120, SUB. No. 3

C. L. CUNNINGHAM EXTENSION—MISSOURI AND OTHER STATES

Petition of L. A. Tucker Truck Lines, Inc., Intervenor in Opposition, for Extraordinary Relief and for Stay of Issuance of Certificate of Public Convenience and Necessity—Filed June 5, 1950.

B. W. LATOURETTE,
314 North Broadway,
St. Louis 2, Missouri,
Attorney for L. T. Tucker
Truck Lines, Inc.

Dated at St. Louis, Missouri, June 2, 1950.

115 Comes now L. T. Tucker Truck Lines, Inc., intervenor in opposition, and respectfully shows to the Commission that in a report of the Commission, Division 5, decided January 13, 1950, it has been found that public convenience and necessity requiry operation by applicant as a common carrier by motor vehicle of general commodities, with exceptions, over specified routes including, ambong others, operations between St. Louis, Missouri and Sikeston, Missouri.

This intervenor in opposition filed exceptions to report and order recommended by C. I. Kephart, Examiner, said exceptions being dated at St. Louis, Missouri, August 8, 1949, on page 12 of which it was pointed out that there was no shipper testimony supporting the applicant's request for authority to conduct operations between St. Louis and Sikeston, Missouri; that the only reference to the latter point in the record was the testimony of R. B. Bowman of the Scott County Milling Company, and that testimony was confined to service between Memphis, Tennessee and Sikeston, Missouri. In a petition for reopening and reconsideration of the report of the Commission, Division 5, decided January 13, 1950, and on page 3 thereof, attention was again called to the erroneous finding made by both the Examiner and the Commission, Division 5. It is only necessary to quote the language from sheet 8 of the report of the Commission, Division 5, to show that the Commission itself recognized the testimony with reference to proposed operations to Sikeston, Missouri to be confined to traffic moving from Memphis, Tennessee. That statement is quoted below:

> "A milling company at Sikeston, population 10,000, has utilized applicant's service from Memphis for a number of years in the movement of empty bags, with full satisfaction. While the purchases are frequent throughout the year, shipments by for-hire carriers do not occur every day, as the

company operated 15 trucks of its own. It has not used the services of Memphis Transport Company or Gordon's Transport from Memphis to Sikeston and these carriers have never solicited its business."

116 Let it be first understood that neither this intervenor in opposition nor its counsel is desirous of proceeding in the United States Court for review of the report of the Commission, Division 5, and they do not feel that they should be put upon the burden of that expense, nor put the Commission in the position of having to make expenditures in defense of such a suit, especially when the issues are so clear and there are admissions in the report of the Commission, Division 5, to sustain our position. We are, therefore, resorting to the filing of a petition for extraordinary relief in view of the fact that there is patent error in the conclusions reached with respect to a grant of authority between St. Louis, Missouri and Sikeston, Missouri.

The record in this proceeding discloses there are adequate motor carrier facilities for the transportation of property between St. Louis, Missouri and Sikeston, and that fact is specifically pointed out in exceptions and in the petition for reopening and reconsideration heretofore filed.

We trust the Commission will understand that we are following the procedure here outlined not only to protect our own interest but in the interest of economy as well. Counsel for this applicant in many years of practice has never found it necessary to seek review of an order of the Commission, his experience being that at all times there has been fair and impartial judgment of the facts adduced in any proceeding before it.

So that the position of this intervenor in opposition may be protected, we respectfully request that the issuance of a certificate be stayed until such time as the commission has opportunity to dispose of this petition.

WHEREFORE, L. A. Tucker Truck Lines, Inc., intervenor in opposition, prays that the Commission further review the order of Division 5, decided January 13, 1950, and enter an order modifying the findings therein made with respect to authorizing

117 operations by applicant between St. Louis, Missouri and Sikeston, Missouri, and until such time as this petition is disposed of the issuance of a certificate be stayed.

Respectfully submitted,

B. W. LATOURETTE.

CERTIFICATE OF SERVICE.

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing by first-class mail a copy thereof properly addressed to each other party.

Dated at St. Louis, Missouri this 2nd day of June, 1950.

B. W. LATOURETTE.

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118 REPORT AND ORDER OF JANUARY 13, 1950. Omitted. Printed side page, 28 ante.

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139 BEFORE INTERSTATE COMMERCE COMMISSION

No. MC-105120 (Sub-No. 3)

C. L. CUNNINGHAM EXTENSION—MISSOURI AND OTHER STATES

No. MC-105120 (Sub-No. 4)

C. L. CUNNINGHAM EXTENSION—NEW MADRID, MO.

Order

Present:

WILLIAM E. LEE, Commissioner, to whom the matters which are subject of this order have been assigned.

Upon consideration of the records in the above-entitled proceedings, and of request of B. W. LaTourette for an extension of time within which to file a petition for reconsideration, rehearing, or reargument of the findings in the report and order of Division 5 of January 13, 1950; and good cause appearing therefor:

It is ordered, That the time within which petitions for reconsideration, rehearing, or reargument may be filed be, and it is hereby, extended to March 15, 1950.

It is further ordered, That replies to petitions may be filed by any party of record on or before March 27, 1950.

Dated at Washington, D. C., this 14th day of February, A. D. 1950.

By the Commission, Commissioner Lee.

W. P. BARTEL,
Secretary.

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140 BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC 105120 (Sub-No. 3) [1]

C. L. CUNNINGHAM EXTENSION—MISSOURI AND OTHER STATES

Petition for Reopening and Reconsideration of L. A. Tucker Truck Lines, Inc., Viking Freight Company, Righter Trucking Company, Superior Forwarding Company, J. F. Walsh D/B/A Walsh Freight Lines, and A. L. Hogan D/B/A Hogan Truck Lines, Intervenors in Opposition—Filed March 15, 1950.

B. W. LATOURETTE,
314 North Broadway,
St. Louis 2, Missouri,
Attorney for Intervenors in
Opposition.

Dated at St. Louis, Mo.: March 13, 1950.
Due: March 15, 1950.

141 In our exceptions, dated August 8, 1949, we discussed rather completely the issues in this case and detailed the present authority of the applicant, the authority sought in this proceeding and the recommendations of the Examiner in the report and order recommended by him and served June 20, 1949 (see pages 1-5 inclusive of exceptions). We respectfully request the Commission to give further consideration to these exceptions in disposing of this petition for reopening and reconsideration.

The report of the Commission, Division 5, in appendix B thereto contains a description of routes authorized in No. MC-105120, Sub No. 3. There are four routes described there as follows:

Route 1—Between St. Louis, Mo., and Memphis, Tenn.

Route 2—Between Chester, Ill., and Sikeston, Mo.

Route 3—Between junction Illinois Highways 3 and 146 near McClure, Ill., and junction Missouri Highway 55 and U. S. Highway 61 near Morley, Mo.

Route 4—Between Hayti, Mo., and junction Missouri Highway 25 and Missouri-Arkansas State line.

The Division report in connection with Route 1, extending between St. Louis and Memphis, Tenn. would authorize service at the intermediate and off-route points as follows:

Those in the St. Louis, Mo.,-East St. Louis, Ill., commercial zone as defined by this Commission; those in Pemiscot County

[1] This report also embraces No. MC-105120 (Sub-No. 4), C. L. Cunningham Extension—New Madrid, Mo.

Mo., Cairo, Ill., and Sikeston, Matthews, Kewanee, New Madrid, Marston, Conran, Lilbourn, Catron, Parma, Risco, Gideon, and Portageville, Mo.

There is a restriction, of course, with respect to operations between St. Louis, Mo.—East St. Louis, Ill. Commercial Zone on the one hand and on the other hand Cairo and Memphis and between Cairo and Memphis.

Route 2 extends between Chester, Ill. and Sikeston, Mo. with no service authorized at intermediate points and with service
142 at Chester restricted to joinder of Route 2 with Route 1.

We would understand this restriction to mean that under the report applicant would not be authorized to conduct operations between Chester, Ill. and Sikeston, Mo. We have, therefore, not included a discussion of this route under our assignments of error.

It appears also that Route 3 is nothing more than an operating route.

Under Route 4, as we understand it, service would be authorized at Hayti and Kennett as termini points, and the intermediate and off-route points of Kennett, Caruth, Senath, Arbyrd, Cardwell and Hornersville, Mo., which would mean that applicant is authorized to serve the points named to and from St. Louis, Mo., Cairo, Ill. and Memphis, Tenn.

Assignments of Error.

1.

The Commission, Division 5, has committed error in authorizing service at the following intermediate and off-route points in connection with Route 1 described in Appendix B to the report:

Cairo, Ill.
Sikeston, Mo.
Matthews, Mo.
Kewanee, Mo.
New Madrid, Mo.
Marston, Mo.
Lilbourn, Mo.

As we have shown on Page 1 of our exceptions, applicant does not hold authority to operate between St. Louis, Mo. on the one hand and the above-named points on the other (See certificate MC 105120).

Sikeston, Mo.

On page 12 of our exceptions, we show that only 1 Sikeston public witness appeared at the hearing. He testified with respect to traffic moving from Memphis, Tenn., to Sikeston, Mo. (Tr. 136). Applicant holds authority under MC 105120, Sub 1 to so

143 operate. (See pages 1 and 2 of exceptions.) There is no testimony in the record as to any need for additional motor carrier service between St. Louis, Mo. and Cairo, Ill. on the one hand and Sikeston, Mo. on the other hand. The record shows an overabundance of daily overnight service between the said termini. For example, daily overnight service is performed between St. Louis, Mo. and Sikeston, Mo. by the following carriers:

L. A. Tucker Truck Lines, Inc.
Memphis Transports, Inc.
Gordon's Transports, Inc.
Kimbel Lines, Inc.

L. A. Tucker Truck Lines, Inc. performs a daily overnight service between Cairo, Ill. and Sikeston, Mo.

In the face of this showing of adequate service presently being performed by these intervenors in opposition between St. Louis, Mo. and Cairo, Ill. on the one hand and Sikeston, Mo. on the other hand, the report authorizes applicant to operate between the said termini. Obviously gross error has been committed by the Division in so doing.

Cairo, Ill.
Matthews, Mo.
Kewanee, Mo.
New Madrid, Mo.
Marston, Mo.
Lilbourn, Mo.

L. A. Tucker Truck Lines, Inc. performs daily overnight service between St. Louis, Mo. and Cairo, Ill. on the one hand and on the other hand the points above named. Such of said points as are located on U. S. Highway 61 are also served by Kimbel Lines, Inc. and Memphis Transports, Inc. No witnesses appeared in support of applicant's request for authority to serve Matthews, Mo., Kewanee, Mo., Marston, Mo., and Lilbourn, Mo. to and from St. Louis, Mo. and Cairo, Ill., yet the Division report grants such authority.

144 New Madrid, Mo.

Applicant has authority to serve New Madrid, Mo. to and from Cairo, Ill. (MC 105120, Sub 2, see page 2 of exceptions.) He does not have authority to serve that point to and from St. Louis. The report therefore grants new authority in the latter instance (see page 1 of exceptions.) Only one witness from New Madrid testified in support of the applicant. In discussing his testimony at Sheet 7 the report states:

"A dealer in hardware and farm implements at New Madrid, population about 3,000, has used applicant's service regularly since the cessation of operation by another carrier, mainly

from St. Louis and Cairo, has found it to be adequate and satisfactory, and desires its continuance. Apparently several other motor carriers serve New Madrid, one of which has hauled shipment for him frequently and another occasionally. Their service is said to be slower than that performed by applicants."

Obviously any shipment transported by applicant for this shipper from St. Louis would move in intrastate commerce since, as we have pointed out, applicant does not presently hold authority in interstate commerce. If applicant did transport such shipments from St. Louis in intrastate commerce, such evidence is irrelevant to the issues in this case and must be disregarded by the Commission.

The report concedes that several other motor carriers serve New Madrid and states that one thereof hauled shipments for this particular shipper frequently and another occasionally. No doubt the statement at Sheet 7 of the report, "Their service is said to be slower than that performed by applicant" refers to a statement of the witness at page 122 of the record, wherein he said:

"Well, our service with Mr. Cunningham in the past years has been very good, and with some of the other carriers it seems like we do not get prompt service, which we do get from Mr. Cunningham."

It must be clear to the Commission that the witness was not referring to the service of L. A. Tucker Truck Lines, Inc., since he testified on cross-examination that he experienced no delays with that carrier that he could speak of (Tr. 127). If the Commission will carefully examine the record detailing the cross examination of this witness it will be found that he has not attempted to use all of the service provided by motor carriers serving St. Louis, Mo. and New Madrid, Mo. in interstate commerce. He testified that he has never used the service of Memphis Transports, Inc. (Tr. 124. He has used Highway Express Company only in a limited way (Tr.124). In referring to the Southwestern Transportation Company, the witness testified that a lot of traffic is hauled by that company and while he stated the service was slow, he admitted that he had never made any definite check of shipments transported by that carrier to determine when they were actually received at the point of origin so that time in transit could be determined (Tr. 128).

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It must be clear to the Commission that this record does not support the findings of the Division authorizing applicant to transport interstate traffic between St. Louis, Mo. and New Madrid, Mo.

2.

The Commission, Division 5, has committed error in authorizing service at the following intermediate and off-route points under Route 4:

Kennett, Mo.
Caruth, Mo.
Senath, Mo.
Arbyrd, Mo.
Cardwell, Mo.
Hornersville, Mo.

The record will show that no public witnesses from these points appeared in support of the application. All of these points are located in Dunklin County, Mo. The applicant does not presently hold any authority to transport property between St. Louis, Mo. and Memphis, Tenn. on the one hand and on the other
146 points in Dunklin County, Mo. (see MC 105120, and MC 105120, Sub 1). He does have authority between Cairo, Ill. on the one hand and the aforenamed points in Dunklin County, Mo. on the other hand (see MC 105120, Sub. 2). To the extent the report grants authority between St. Louis, Mo. and Cairo, Ill. on the one hand and the aforenamed points on the other hand, it is a new grant of authority unsupported by any evidence in the record.

A. L. Hogan, d/b/a Hogan Truck Line has authority to serve all of the named points from St. Louis and Memphis (see Sheet 12 of report); Walsh Freight Lines has authority to serve most of these points to and from St. Louis (see Sheets 10 and 11 of report).

Thus it has been shown that the Commission, Division 5, has ignored the record entirely in authorizing operations as described in connection with Route 4. The report should be modified to conform to that record.

Conclusion.

The proceeding should be reopened and the report of the Commission, Division 5, reconsidered with respect to the matters hereinabove set forth.

Respectfully submitted,

B. W. LaTourette,
314 North Broadway
St. Louis 2, Missouri,
Attorneys for Interevnors
in Opposition.

Dated at St. Louis, Mo.: March 13, 1950.
Due: March 15, 1950.

147 CERTIFICATE OF SERVICE.

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing by first-class mail a copy thereof properly addressed to each other party.

Dated at St. Louis, Missouri this 13th day of March, 1950.

B. W. LATOURETTE.

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148 ORDER OF MAY 4, 1950. Omitted. Printed side page, 50 ante.

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149 ORDER OF JUNE 29, 1950. Omitted. Printed side page, 51 ante.

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150 [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

No. 7490 (3)

L. A. TUCKER TRUCK LINES, INCORPORATED, Plaintiff,

vs.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, Defendants.

APPEARANCES:

Gregory M. Rebman, Attorney for Plaintiff.

William J. Hickey, Special Asst. to Attorney General, Drake Watson, United States Attorney, and Marvin C. Hopper, Asst. United States Attorney, Attorneys for Defendant, United States of America.

Harry L. Underwood, Asst. Chief Counsel, Interstate Commerce Commission, Attorney for Defendant, Interstate Commerce Commission.

Before WOODROUGH, Circuit Judge, HULEN and HARPER, District Judges.

Memorandum Opinion—Filed October 18, 1951.

HARPER, *Judge:*

This is an action by L. A. Tucker Truck Lines, Inc., to annul, set aside and enjoin an order of the Interstate Commerce Commission, granting C. L. Cunningham, d/b/a Pemiscot Motor Freight Company, a common carrier by motor vehicle, additional operating authority to engage in interstate commerce over regular routes between specified points in the United States as more fully de-

scribed in a certificate of public convenience and necessity issued to Pemiscot Motor Freight Company in accordance with the terms of the above described order. The case was heard by a court composed of three judges, pursuant to Section 2284 and 2325, Title 28, USCA.

151 Orders of the Interstate Commerce Commission are reviewable in this court. *United States* v. *Maher*, 307 U. S. 148. The functions of the reviewing court are structly limited. With respect to such limitations the Supreme Court in *Rochester Telephone Company* v. *United States*, 307 U. S. 125, l. c. 140, said: "Only questions affecting constitutional power, statutory authority and basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's orders become incontestable."

The plaintiff (L. A. Tucker Truck Lines, Inc.) on the day of the trial sought leave to file an amended petition, raising in addition to what had been raised in its original petition the further fact that C. I. (Calvin I.) Kephart, the examiner who heard this matter for the Interstate Commerce Commission, had not at the time of the hearing been appointed an examiner pursuant to Section 11 of the Administrative Procedure Act (Public Law 404—79th Congress, Title 5, U. S. C. Sec. 1010). The court reserved ruling on the plaintiff's motion to amend its petition. Proof was introduced to the effect that on January 27, 1949, the date of the hearing in No. MC-105120 (Sub-No. 3), Pemiscot Motor Freight Company, Calvin I. Kephart had not been appointed an examiner pursuant to Section 11 of the Administrative Act.

The Supreme Court in the case of *Riss & Company, Inc.* v. *United States*, 341 U. S. 907, held that Interstate Commerce Commission hearings must be held by examiners appointed to conform with the requirements of the Administrative Procedure Act.

Before considering the merits of the order in question we consider the validity of the order, since Kephart, the hearing examiner, was not qualified as a hearing examiner pursuant to the Administrative Procedure Act. The Supreme Court in the case of *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, l. c. 53, said: "We hold that deportation proceedings must conform to the requirements of the Administrative Procedures Act, if resulting orders are to have validity."

While the *Wong Yang Sung* case was one dealing with personal rights and this action deals with property rights, yet a dis-
152 tinction should not be drawn between the two if the Administrative Procedure Act applies to both. The Supreme Court in *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Company*, 227 U. S. 88, l. c. 91, said: "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character,

are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence.'"

Judge Hincks, District Judge for Connecticut, in the case of *General Broadcasting System* v. *Bridgeport B. Station,* 53 F. 2d 664, l. c. 668, said: "The field of the superior body being narrow under the express provisions of the act, the matter is one for the application of the rule that acts of an administrative body which do not come clearly within the powers granted to it by the Legislature are void."

The United States Court of Appeals for the District of Columbia in *Heitmeyer* v. *Federal Communications Commission,* 95 F. 2d 91, l. c. 100, said: "Proper adminstration of the law by governmental agencies such as the Communications Commission requires careful servance of the procedures established by Congress. For the protection of the people generally, to say nothing of the agencies themselves, convenience of administration cannot be permitted to justify noncompliance with the law, or the substitution of fiat for adjudication."

In a matter similar to this action, the California courts have held in *National Automobile & Casualty Ins. Co.* v. *Downey,* 220 Pac. 2d 962, l. c. 967, as follows: "Since the agency did not have jurisdiction, in that the proceeding under review had not been heard by a properly qualified person, the result is that the issues had not been determined first or at all by the administrative agency. Therefore, the court properly refrained from determining the sufficiency of the evidence."

Amendments to pleadings are largely discretionary with the courts and the courts have repeatedly held that amendments
153 to pleadings should be allowed with great liberality at any stage of the proceedings unless violative of settled law or prejudicial to rights of opposing parties. The courts have been very liberal in permitting amendments where it is necessary to bring about a furtherance of justice.

The cases referred to above and many not cited would indicate that the order entered by the Interstate Commerce Commission is void and to deny the right of the L. A. Tucker Truck Lines, Inc., to file its amended petition would only add to confusion. Even if that were not true, we are of the opinion that the amendment should be permitted in the interest of justice. "It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points. So, when a District Court has not made findings in accordance with our

controlling rule (Equity Rule 70-1/2) it is our practice to set aside the decree and remand the cause for further proceedings." *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, l. c. 373.

In numerous cases causes have been remanded to the Interstate Commerce Commission by the district courts for appropriate action in accordance with the opinion of the courts. The right of the plaintiff, L. A. Tucker Truck Lines, Inc., to file its first amendment to its petition is granted, the order of the Commission dated August 7, 1950, is set aside and the cause remanded to the Commission for such action as it may deem appropriate, and in accordance with this opinion.

JOSEPH W. WOODROUGH,
United States Circuit Judge.
RUBEY M. HULEN,
United States District Judge.
ROY W. HARPER,
United States District Judge.

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154 IN UNITED STATES DISTRICT COURT

[Title omitted.]

First Amendment to Plaintiff's Petition—Filed October 18, 1951.

Comes now plaintiff, L. A. Tucker Truck Lines, Inc., a corporation, and by its attorneys, amends its petition heretofore filed herein in the following particulars:

1. Plaintiff reaffirms and realleges each and every allegation set out and contained in its petition heretofore filed and more particularly in Paragraphs 1 to 15 inclusive.

2. (a) Plaintiff further alleges with reference to Paragraph 5 of its petition herein, that C. I. Kephart, is one and the same person as Calvin I. Kephart, the person to whom the application of C. L. Cunningham, d/b/a Pemiscot Motor Freight Company in Docket No. MC 105120, Sub 3, was referred for hearing.

(b) Plaintiff further states that as of the 27th day of January, 1949, the date of hearing in the above entitled matter, the said Calvin I. Kephart had not been appointed an Examiner pursuant to Section 11 of the Administrative Procedure Act (Public Law 404—79th Congress), Title 5, U. S. C. Section 1010.

(c) Plaintiff further states that the proceedings herein and the matter of the application which was the subject of hearing and decision as complained of herein, was of such nature as requires

a hearing before a qualified Examiner as provided for in Sections 5, 7 and 8 of the Administrative Procedure Act (Public Law 404—79th Congress), Title 5, U. S. C., Sections 1004, 1006, and 1007.

(d) Plaintiff further states that inasmuch as the said Calvin I. Kephart was not, at the time of the hearing herein, a hearing Examiner as provided for in the Administrative Procedure
155 Act above referred to, said proceedings, as well as all further action of the Interstate Commerce Commission therein, were null and void for want of jurisdiction, all as provided for in said Administrative Procedure Act above.

3. Plaintiff further amends its prayer for relief by praying that the Court, in addition to the relief heretofore prayed for, make and find an order herein that the proceedings had in Docket No. MC 105120, Sub 3, were null and void by reason of the fact that the person to whom said matter was referred for hearing was not an Examiner as required by law.

B. W. LaTourette, and
G. M. Rebman,
314 North Broadway,
St. Louis 2, Missouri,
Attorneys for Plaintiff.

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156 IN UNITED STATES DISTRICT COURT

[Title omitted.]

[File endorsement omitted.]

Statement of Fact and Conclusions of Law—Filed December 7, 1951.

A. Statement of Fact.

1. The within action is an action brought by L. A. Tucker Truck Lines, Inc., plaintiff herein, seeking review of an order of the Interstate Commerce Commission issued on January 13, 1950, in the matter of the application of C. L. Cunningham, d/b/a Pemiscot Motor Freight Company, Docket No. MC 105120, Sub No. 3, in which said order the Interstate Commerce Commission found that public convenience and necessity require operations by the said C. L. Cunningham, d/b/a Pemiscot Motor Freight Company, as a common carrier by motor vehicle in interstate commerce as described in said order, and approved the issuance of a Certificate of Public Convenience and Necessity upon compliance by the said C. L. Cunningham, d/b/a Pemiscot Motor Freight Company with certain conditions as set out in said order of January 13, 1950. This action further seeks to have set aside the Certificate of Public

Convenience and Necessity which was issued to said C. L. Cunningham, d/b/a Pemiscot Motor Freight Company on the 7th day of August, 1950, in compliance with the above order.

2. The above order dated January 13, 1950, in the matter of the application of C. L. Cunningham, d/b/a Pemiscot Motor Freight Company was entered following a hearing before C. I. (Calvin I.) Kephart who at the time of the hearing in said matter, had not been appointed an Examiner in accordance with the provisions of Section 11 of the Administrative Procedure Act (Public
157 Law 404—79th Congress, Title 5 U. S. C., Section 1010).

3. Plaintiff, L. A. Tucker Truck Lines, Inc., is a corporation duly organized and existing according to law and as such, is engaged in the business of a common carrier of general commodities by motor vehicle in interstate commerce under and by virtue of Certificate of Public Convenience and Necessity No. MC 3062, issued by the said Interstate Commerce Commission to plaintiff herein, authorizing it to serve, at least in part, a territory similar to that authorized to be served by the said C. L. Cunningham, d/b/a Pemiscot Motor Freight Company in Certificate No. MC 105120 hereinabove referred to. Said L. A. Tucker Truck Lines, Inc., plaintiff herein, has been a party of record throughout the entire proceedings before the Interstate Commerce Commission in the matter of the application of C. L. Cunningham, d/b/a Pemiscot Motor Freight Company, Docket No. MC 105120, Sub No. 3.

B. Conclusions of Law.

1. This Court has jurisdiction of the within cause by virtue of the provisions of Section 2284 and 2385, Title 28, U. S. C. A.

2. Plaintiff, L. A. Tucker Truck Lines, Inc., a corporation, is a proper party plaintiff.

3. Plaintiff, L. A. Tucker Truck Lines, Inc., has exhausted all of its remedies before the Interstate Commerce Commission.

4. The proceedings before the Interstate Commerce Commission in the matter of the application of C. L. Cunningham, d/b/a Pemiscot Motor Freight Company, Docket No. MC 105120, Sub No. 3, which are the subject of review herein, are of such nature as to require a hearing before an Examiner duly qualified in accordance with the provisions of Section 11 of the Administrative Procedure Act (Public Law 404—79th Congress, Title 5, U. S. C., Section 1010).

5. The order entered by the Interstate Commerce Commission on January 13, 1950, in the matter of the application of C. L. Cunningham, d/b/a Pemiscot Motor Freight Company, Docket No. MC 105120, Sub No. 3, and Certificate No. MC 105120, issued to said C. L. Cunningham, d/b/a Pemiscot Motor Freight Company on August 7, 1950, pursuant to the above referred to order

158 of January 13, 1950, authorizing said C. L. Cunningham, d/b/a Pemiscot Motor Freight Company to conduct operations of a common carrier of general commodities by motor vehicle in interstate commerce, are invalid because the Interstate Commerce Commission did not have jurisdiction, in that the proceedings under review had not been heard by a properly qualified person under Section 11 of the Administrative Procedure Act (Public Law 404—79th Congress, Title 5, U. S. C., Section 1010).

JOSEPH W. WOODROUGH,
United States Circuit Court Judge.

RUBEY M. HULEN,
United States District Court Judge.

ROY W. HARPER,
United States District Court Judge.

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159 [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

No. 7490 (3)

L. A. TUCKER TRUCK LINES, INCORPORATED, Plaintiff,

vs.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, Defendants.

Order and Judgment—Filed December 7, 1951.

The Court having heretofore made and entered its Statement of Facts and Conclusions of Law, finding the order of the Interstate Commerce Commission issued on the 13th day of January, 1950, in the matter of the application of C. L. Cunningham, d/b/a Pemiscot Motor Freight Company, Docket No. MC 105120, Sub No. 3, and the Certificate of Public Convenience and Necessity No. MC 105120, issued to C. L. Cunningham, d/b/a Pemiscot Motor Freight Company, dated the 7th day of August, 1950, to be null and void.

It is, therefore, Ordered, Adjudged and Decreed that:

1. The Certificate of Public Convenience and Necessity No. MC 105120, issued to C. L. Cunningham, d/b/a Pemiscot Motor Freight Company, dated the 7th day of August, 1950, be and the same is hereby revoked and cancelled.

2. The order of the Interstate Commerce Commission issued on the 13th day of January, 1950, in the matter of the application of C. L. Cunningham, d/b/a Pemiscot Motor Freight Company, Docket No. MC 105120, Sub No. 3, be set aside and for naught held and said matter be and the same is hereby remanded to the Inter-

state Commerce Commission for further proceedings not inconsistent with the opinion of the Court heretofore filed herein.

3. The costs of this action be assessed against defendants.

JOSEPH W. WOODROUGH,
United States Circuit Court Judge.
RUBEY M. HULEN,
United States District Court Judge.
ROY W. HARPER,
United States District Court Judge.

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160 IN UNITED STATES DISTRICT COURT

[Title omitted.]

Petition for Appeal—Filed January 28, 1952.

The United States of America and the Interstate Commerce Commission, defendants in the above-entitled cause, feeling themselves aggrieved by the final decree of the United States District Court for the Eastern District of Missouri, Eastern Division, entered in said court on December 7, 1951, pray an appeal from said decree to the Supreme Court of the United States.

The particulars wherein said defendants consider the decree erroneous are set forth in the assignment of errors accompanying this petition, to which reference is hereby made.

Said defendants pray that a transcript of the record, proceedings and papers on which said decree was made and entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated January 28, 1952.

H. G. MORISON,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
Special Assistant to the Attorney General.
GEO. L. ROBERTSON,
United States Attorney, For the United States of America.

161 DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.
EDWARD M. REIDY,
Associate Chief Counsel, Interstate Commerce Commission.
SAMUEL R. HOWELL,
Assistant Chief Counsel, Interstate Commerce Commission, For the Interstate Commerce Commission.

162 IN UNITED STATES DISTRICT COURT

[Title omitted.]

Order Allowing Appeal—Filed January 28, 1952.

The United States of America and the Interstate Commerce Commission, defendants in the above-entitled cause, having made and filed a petition praying an appeal to the Supreme Court of the United States from the final decree of this Court in said cause entered on December 7, 1951, and having also made and filed an assignment of errors, and a statement of jurisdiction, and having in all respects conformed to the statutes and rules of court in such case made and provided:

It is ordered and decreed, That the said appeal be, and the same is hereby, allowed as prayed for.

Dated January 28, 1952.

ROY W. HARPER,
United States District Judge.

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163 Citation in usual form omitted in printing.

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164 IN UNITED STATES DISTRICT COURT

[Title omitted.]

Notice of Appeal—Filed January 28, 1952.

To: L. A. TUCKER TRUCK LINES, INC.

Please take notice that, pursuant to the statutes and rules of court in such case made and provided, the United States of America and the Interstate Commerce Commission, defendants in the above-entitled cause, hereby appeal to the Supreme Court of the United States from the final order and decree of the United States District Court for the Eastern District of Missouri, Eastern Division, made and entered December 7, 1951, setting aside the report of the Commission of January 13, 1950, in Docket No. MC-105120 (Sub-Nos. 3 and 4), *C. L. Cunningham Extension—Missouri and Other States,* wherein the Commission found that public convenience and necessity required operation by applicant as a common carrier by motor vehicle of general commodities, with exceptions, over specified routes, between certain points in Missouri and

Illinois and Memphis, Tenn., serving specified intermediate and off-route points, subject to conditions.

Dated January 28, 1952.

165 H. G. MORISON,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
Special Assistant to the Attorney General.
GEO. L. ROBERTSON,
United States Attorney, For the United States of America.
DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.
EDWARD M. REIDY,
Associate Chief Counsel, Interstate Commerce Commission.
SAMUEL R. HOWELL,
Assistant Chief Counsel, Interstate Commerce Commission, For the Interstate Commerce Commission.

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166 IN UNITED STATES DISTRICT COURT

[Title omitted.]

Assignment of Errors—Filed January 28, 1952.

The United States of America and the Interstate Commerce Commission, defendants in the above-entitled cause, in connection with their appeal herein file the following assignment of errors upon which they will rely in their prosecution of said appeal to the Supreme Court of the United States from the final decree of the District Court dated December 7, 1951. The District Court erred:

1. In failing to hold that plaintiff's failure to make the objection before the Interstate Commerce Commission that the examiner had not been appointed pursuant to Section 11 of the Administrative Procedure Act precluded it from raising the issue in the District Court.

2. In holding that because the examiner had not been appointed under the Administrative Procedure Act, the Commission "did not have jurisdiction" and the proceedings before it were "invalid."

3. In revoking and cancelling the certificate of public convenience and necessity issued to Pemiscot Motor Freight Company,

setting aside the order of the Commission granting the certificate, and remanding the matter to the Commission for further proceedings not inconsistent with the Court's opinion.

167 WHEREFORE, the defendants, the United States of America and the Interstate Commerce Commission, pray that said decree of December 7, 1951, be reversed.

Dated January 28, 1952.

H. G. MORISON,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
Special Assistant to the Attorney General.
GEO. L. ROBERTSON,
United States Attorney, For the United States of America.
DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.
EDWARD M. REIDY,
Associate Chief Counsel, Interstate Commerce Commission.
SAMUEL R. HOWELL,
Assistant Chief Counsel, Interstate Commerce Commission, For the Interstate Commerce Commission.

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168 STATEMENT DIRECTING ATTENTION TO PARAGRAPH 3 OF RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES (omitted in printing).

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170 ORDER AS TO EXHIBITS (omitted in printing).

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171 IN UNITED STATES DISTRICT COURT

[Title omitted.]

Docket Entries.

1950

September 12—Complaint filed and summons issued directed to defendants returnable within 60 days after service.

September 15—Order filed of Honorable Archibald K. Gardner, Chief Judge of United States Court of Appeals, 8th Circuit, designating Honorable Joseph W. Woodrough, U. S. Circuit Judge, and Honorable Rubey M. Hulen, U. S. District Judge for Eastern District of Missouri, to sit with Judge Roy W. Harper of this Court to hear and determine cause herein.

September 20—Marshal's return of service to summons, etc., filed (executed).

November 10—Answer of deft. Interstate Commerce Commission to pltff's complaint, filed.

November 14—On oral motion of U. S. Attorney, order filed granting defendant, U. S. of A. extension of time to and including December 14, 1950 to file answer.

November 16—Separate answer of defendant U. S. of A. to pltff's complaint, filed.

1951

March 9—Cause set for trial before Statutory Three-Judge Court on May 1, 1951.

March 23—Order heretofore entered setting cause for trial on May 1, 1951 vacated and cause rest for trial on May 25, 1951.

May 25—Statutory Three-Judge Court consisting of Honorable Joseph W. Woodrough, U. S. Circuit Judge, and Honorable Rubey M. Hulen and Roy W. Harper, U. S. District Judges, convenes for final hearing of cause, and pltff. appears by G. M. Redman, Esq., and defendant U. S. of A. appears by Wm. J. Hickey, Esq., Special Assistant to the Attorney General and Intervening defendant, I. C. C. appears by Harry L. Underwood, Esq., Assistant Chief Counsel of I. C. C., and announce ready for trial. Motion of pltff. for leave to amend petition, filed, argued and submitted. Thereupon final hearing of cause before said Statutory Court is commenced, concluded and issues submitted. Memo brief of U. S. of A. filed, and brief and reports of I. C. C. filed. Pltff. granted 10 days to file answering brief and deft. U. S. of A. granted 10 days thereafter to file reply brief.

June 8—Brief of deft. I. C. C. in opposition to pltff's, filed.

October 18—Memo opinion of Honorable Roy W. Harper on behalf of statutory three-judge Court composed of Honorable Joseph W. Woodrough, Circuit Judge; Rubey M. Hulen, U. S. District Judge and Roy W. Harper, U. S. District Judge, before whom cause was heard and submitted, with affixed signatures of each of the judges constituting such Court, filed. The right of the pltff, L. A. Tucker Truck Lines, Inc. to file its first amendment to its petition is granted; the order of the Commission dated August 7, 1950 is set aside and cause remanded to the Commission for such action as it may deem appropriate in accordance with this opinion.

December 7—Findings of fact and conclusions of law of Honorable Joseph W. Woodrough, U. S. Circuit Judge; Rubey M. Hulen and Roy W. Harper, U. S. District Judges, constituting Statutory Three-Judge Court, filed and final order and judgment of such Court in accordance therewith filed and entered revoking and cancelling Certificate of Public Convenience and Necessity No. MC 105120 issued by I. C. C. to C. L. Cunningham, d/b/a, etc. dated August 7, 1950; in the matter of the application of C. L. Cunningham, d/b/a etc. docket No. MC105120, sub No. 3 and remanding said matter to the I. C. C. for further proceedings not inconsistent with the opinion of the Court heretofore filed, herein, and assessing costs against defts.

172 January 28—Petition of defendants U. S. of A. and I. C. C. to Sup. Ct. of U. S. from final decree entered herein December 7, 1951, together with assignment of errors thereon, filed and presented and order allowing said appeal filed. Citation issued, acknowledged and filed. Notice of Appeals filed. Defendants-appellants' Statement as to Jurisdiction, separate statement directing attention to paragraph 3 of Rule 12 of revised rules of Supreme Court, and praecipe for transcript of record on said appeal, filed. Order filed directing documents and papers received in evidence in District Court in trial, in lieu of copies thereof, be transmitted to Clerk of the Supreme Court as part of transcript of record on appeal herein.

Clerk's Certificate to foregoing paper omitted in printing.

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173 IN UNITED STATES DISTRICT COURT

[Title omitted.]

Praecipe—Filed January 28, 1952.

The Clerk will please prepare a transcript of the record in the above-entitled cause to be transmitted to the Clerk of the Supreme Court of the United States and include therein:

1. Petition of the L. A. Tucker Truck Lines, Inc., together with Exhibits I-VI, inclusive.
1-A. Order constituting Three-Judge Court.
2. Answer of the United States.
3. Answer of the Interstate Commerce Commission.
4. Motion for leave of Court to amend petition.
5. First Amendment to plaintiff's petition.
6. Opposition of Interstate Commerce Commission to motion for leave to amend petition.
7. Exhibit No. 1, record before the Commission.
8. Opinion of the Court, filed October 18, 1951.

9. Findings of fact and conclusions of law submitted by plaintiff, dated November 24, 1951. (not of record)

10. Objections and suggestions of United States and Interstate Commerce Commission, dated December 4, 1951, to plaintiff's suggested findings of fact and conclusions of law. (not of record)

11. Findings of fact and conclusions of law entered by Court on December 7, 1951, and Judge Harper's letter of same date to Assistant Attorney General Morison with respect thereto.

174 12. Final judgment and decree of the Court, entered December 7, 1951.

13. Petition for apepal.

14. Order allowing appeal.

15. Citation on appeal.

16. Notice of appeal to plaintiff and others.

17. Assignment of errors by the United States and Interstate Commerce Commission.

18. Statement by defendants directing attention to paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States and proof of service.

18-A. Statement as to the jurisdiction.

19. Order of the District Court as to exhibits.

19-A. Clerk's essential docket entries.

20. This praecipe.

Dated January , 1952.

H. G. MORISON,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
Special Assistant to the Attorney General.
GEO. L. ROBERTSON,
United States Attorney, For the United States of America.
DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.
EDWARD M. REIDY,
Associate Chief Counsel, Interstate Commerce Commission.
SAMUEL R. HOWELL,
Assistant Chief Counsel, Interstate Commerce Commission, For the Interstate Commerce Commission.

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175 Clerk's Certificate to foregoing transcript omitted in printing.

176 IN THE SUPREME COURT OF THE UNITED STATES

No. 621, OCTOBER TERM, 1951

[Title omitted.]

Stipulation as to Parts of the Record to be Printed—

Filed March 10, 1952.

Appellee's Exhibit No. 1, introduced in evidence at the hearing in this cause before the United States District Court for the Eastern District of Missouri, Eastern Division on May 25, 1951, consists of the record before the Interstate Commerce Commission in Docket No. MC-105120 (Sub-Nos. 3 and 4), *L. C. Cunningham Extension—Missouri and Other States*, on the Commission's docket. Such record, consisting of testimony and exhibits before the Commission, have been included as part of the record on appeal herein, pursuant to item 7 of the praecipe of appellants for transcript of record, heretofore filed herein.

Inasmuch as the parties to this appeal do not consider it necessary to refer extensively to the testimony and exhibits before the Commission, they have entered into this stipulation for the purpose of minimizing the cost of printing the record herein.

It is, therefore, stipulated and agreed that that part of the record on appeal consisting of certified copies of the testi-
177 mony and exhibits before the Interstate Commerce Commission in Docket No. 105120 (Sub-Nos. 3 and 4), *L. A. Cunningham Extension—Missouri and Other States*, which were introduced in evidence as Exhibit No. 1 at the hearing before the United States District Court on May 25, 1951, and were included in the record on appeal herein pursuant to item 7 of appellants' praecipe for transcript of record, shall stand as part of the record on appeal as original exhibits and shall not be printed, but any party and the Court may refer to such documents with the same force and effect as if they had been printed in full in the transcript of record.

PHILIP P. PERLMAN,
Solicitor General, For Appellant, United States of America.
DANIEL W. KNOWLTON,
Chief Counsel, For Appellant, Interstate Commerce Commission.
B. W. LATOURETTE,
G. M. REBMAN,
Attorneys for Appellee.

179 IN THE SUPREME COURT OF THE UNITED STATES

No. 621, OCTOBER TERM, 1951

[Title omitted.]

Statement of Points to be Relied Upon—Filed May 26, 1952.

Appellants adopt for their statement of points upon which they intend to rely on their appeal to this Court the points contained in their assignment of errors heretofore filed.

PHILIP B. PERLMAN,
Solicitor General.
EDWARD M. REIDY,
Chief Counsel, Interstate Commerce Commission.

May 26, 1952.

[File endorsement omitted.]

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181 SUPREME COURT OF THE UNITED STATES

No. 621, OCTOBER TERM, 1951

[Title omitted.]

Order Noting Probable Jurisdiction—March 24, 1952.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

U. S. GOVERNMENT PRINTING OFFICE 1952—244756/P.O. 41

No. 684

In the Supreme Court of the United States

OCTOBER TERM, 1951

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

L. A. TUCKER TRUCK LINES, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

STATEMENT AS TO JURISDICTION

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

Civil No. 7490(3).

L. A. TUCKER TRUCK LINES, INC., PLAINTIFF,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

STATEMENT AS TO JURISDICTION

(Filed January 28, 1952)

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the United States of America and the Interstate Commerce Commission, submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the district court entered in this cause on December 7, 1951. A petition for appeal is presented to the district court herewith on January 28, 1952.

OPINION BELOW

The opinion of the District Court for the Eastern District of Missouri, Eastern Division, is reported

in 100 F. Supp. 432, and is attached hereto as Appendix A.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the decision in this cause is conferred by 28 U. S. C. 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this cause. *United States* v. *Capital Transit Company,* 338 U. S. 286; *United States* v. *Pacific Coast Wholesalers' Association,* 338 U. S. 689; *Alabama Great Southern Railroad Company* v. *United States,* 340 U. S. 216.

QUESTION PRESENTED

Whether a motor carrier can raise for the first time in judicial proceedings to set aside an order of the Interstate Commerce Commission, the issue that the Commission's hearing examiner had not been appointed pursuant to Section 11 of the Administrative Procedure Act, when the carrier had failed to raise such issue before the Commission.

STATUTES INVOLVED

The pertinent provisions of Part II of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 301 *et seq.*, and of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001 *et seq.*, are as follows:

INTERSTATE COMMERCE ACT

Sec. 207. Subject to section 310 of this title, a certificate shall be issued to any qualified ap-

plicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied * * *

ADMINISTRATIVE PROCEDURE ACT

Sec. 5. In every case required by statute to be determined on the record after opportunity for an agency hearing * * *

(c) The same officers who preside at the reception of evidence pursuant to section 1006 of this title shall make the recommended decision or initial decision * * * nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of any investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings * * *

Sec. 7. In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—

(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this chapter * * *

Sec. 11. Subject to the civil-service and other laws to the extent not inconsistent with this chapter, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 1006 and 1007 of this title * * *

STATEMENT

In August, 1948, Pemiscot Motor Freight Company, a motor common carrier, filed an application with the Commission for a certificate of public convenience and necessity under Section 207(a) of the Interstate Commerce Act to extend its operating authority. Tucker Truck Lines, a competing carrier, appeared in the proceedings and opposed the application. Hearings were held in January, 1949, before an examiner who had not been appointed pursuant to Section 11 of the Administrative Procedure Act. The examiner recommended that the certificate be granted, and in January, 1950, Division 5 of the Commission filed its Report that the certificate should issue. Tucker's petition for reconsideration by the full Commission was denied, and its petition for ex-

traordinary relief also was rejected. Pemiscot received its certificate in August 1950.

On September 12, 1950, Tucker commenced the present suit to set aside the Commission's order, alleging that the Commission's findings were without substantial evidentiary support, and that the Commission had acted arbitrarily in granting the certificate to Pemiscot. Up to this point Tucker had made no objection based upon the fact that the examiner had not been appointed pursuant to the Administrative Procedure Act.

On April 16, 1951, this Court handed down its decision in *Riss & Co.* v. *United States,* 341 U. S. 907, holding, contrary to the ruling of the Commission which the district court in that case had affirmed, that the Commission had erred in failing to designate an examiner appointed under Section 11 of the Administrative Procedure Act to conduct hearings in proceedings under Section 207(a) of the Interstate Commerce Act.

When the district court convened to hear the instant case on May 24, 1951, Tucker requested, and obtained, leave to file an amended petition raising the issue that a duly authorized examiner had not presided at the hearings. The court held with respect to this issue that since the proceedings "had not been heard by a proper qualified person under Section 11 of the Administrative Procedure Act," the Commission "did not have jurisdiction" and the proceedings before it were

"invalid." The court accordingly "revoked and cancelled" Pemiscot's certificate, set aside the Commission order granting it, and remanded the matter to the Commission for further proceedings "not inconsistent" with the court's opinion.

THE QUESTION IS SUBSTANTIAL

This appeal presents the substantial question whether the objection that the examiner who presided at an agency hearing had not been appointed under Section 11 of the Administrative Procedure Act may be raised for the first time upon judicial review of the administrative proceedings. That issue was neither presented to nor decided by this Court in *Riss & Co.* v. *United States*, 341 U. S. 907, since in *Riss* the examiner objection had been specifically raised during the Commission proceedings, once during the hearing and again by Riss' petition for reconsideration.[1]

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[1] In the *Riss* case Riss itself had sought a certificate of convenience and necessity to extend its own operations, and discovered on the last day of the hearings that the examiner had not been appointed under the Administrative Procedure Act. Riss formally objected to the conduct of the proceedings on this ground. The objection was disallowed, and Division 5 of the Commission, following the examiner's recommendation, denied the certificate application on the merits. The full Commission denied a petition for reconsideration in which the examiner issue was again raised.

On court review of the Commission order, Riss once more challenged the examiner's capacity. The district court affirmed the Commission order. The court held that inasmuch as Riss admittedly had received a "fair" hearing, the fact that such hearing had not been conducted before an examiner appointed under Section 11 of the Administrative Procedure Act did not invalidate the proceedings. The court held that

In the instant case, however, the protesting carrier remained silent on this issue during the two years that the proceedings were pending before the Commission. In fact, more than 8 months elapsed between the filing of Tucker's petition to review and its initial raising of the issue, shortly after this Court's decision in the *Riss* case.

The decision below thus departs from the well-established rule that courts on review will consider only those issues that have been raised be-

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this section does not apply to proceedings under Section 207(a) of the Interstate Commerce Act because, in the court's view, such proceedings are not required by statute to be determined on the record after opportunity for hearing.

On appeal, the Supreme Court reversed in a *per curiam* opinion, which stated: "The judgment is reversed. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33".

In the *Sung* case the Supreme Court held that deportation proceedings were subject to the hearing requirements of the Administrative Procedure Act. Although the deportation statute did not in terms require a hearing, judicial interpretation had read such a requirement into the statute to sustain its constitutionality. The Court held that the statutory hearing referred to in Section 5 of the Administrative Procedure Act also included hearings "the requirement for which has been read into a statute by this Court to save the statute from invalidity." 339 U.S. 50.

The factual situation in the instant case is markedly different from that in *Riss*. There the Commission's Bureau of Motor Carriers, one of whose employees was the examiner, itself intervened in the proceedings and actively contested Riss' fitness and ability to perform the proposed services. In the instant case, however, the Bureau did not participate in the hearing at all. Its sole connection with the proceedings was the fact that the examiner was one of those employees. Tucker made no contention in the district court that the hearing was "unfair", and it is clear that, apart from the technical point that the examiner had not been appointed pursuant to the Administrative Procedure Act, all the procedural and substantive requirements of a "fair hearing" were met. Cf. *Morgan* v. *United States*, 298 U.S. 468, 304 U.S. 1.

fore the administrative agency—a rule based on the "salutary policy" of affording the agency "opportunity to consider on the merits questions to be urged upon review of its order." *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U. S. 253, 256; cf. *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U. S. 143, 155.[2] While most of the cases invoking this doctrine have arisen under statutes which specifically provide that the court can consider on review only matters raised before the agency—a limitation not contained in the Urgent Deficiencies Act, under which this action was brought—the settled policy against unduly protracting litigation requires application of the principle to review of Interstate Commerce Commission orders by statutory three-judge district courts. Otherwise a litigant before the Interstate Commerce Commission could fight the case on the merits before the agency, taking a "chance of a favorable decision on the record as made;" if he lost, he could then raise the procedural point de novo before the district court. Cf. *United States* v. *Northern Pacific Railway*, 288 U. S. 490, 494.

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[2] This rule has been applied to bar consideration of even constitutional and jurisdictional objections (*Todd* v. *Securities and Exchange Commission*, 137 F. 2d 475 (C.A. 6)), (constitutional), (*Halsted* v. *Securities and Exchange Commission*, 182 F. 2d 660 (C.A. D.C.)) (company not engaged in or affecting interstate commerce), as well as the contention that the agency failed to make adequate findings (*Seaboard & Western Airlines* v. *Civil Aeronautics Board*, 183 F. 2d 975 (C.A. D.C.)).

In reviewing orders of the Interstate Commerce Commission, the courts consistently have refused to consider objections not presented to the Commission. *Carolina Scenic Coach Lines* v. *United States,* 56 F. Supp. 801, affirmed 323 U. S. 678; *General Transp. Co.* v. *United States,* 65 F. Supp. 981, affirmed, 329 U. S. 668; cf. *Transamerican Freight Lines* v. *United States,* 51 F. Supp. 405, 412, n. 10. In *United States* v. *Hancock Truck Lines,* 324 U. S. 774, this Court held that appellee's waiver of a specific objection on a petition for reconsideration filed with the Commission barred it from raising the issue before the district court. The "reasoning" of the *Hancock* case was cited by the district court in the *General Transp.* case, *supra,* as authority for denying the carrier the right to raise an issue not presented to the Commission, although not specifically waived. In *United States* v. *Capital Transit Co.,* 338 U. S. 286, 291, the Court refused to consider the contention that rates fixed by the Interstate Commerce Commission were confiscatory. The Court held that since "the record fails to show that the issue was properly presented to the Commission for its determination," the question was not "ripe for judicial review." That the applicability of this rule should not depend upon the existence of a specific statutory provision is further shown by the consistent refusal of appellate courts to consider issues not presented to trial courts. *Weade* v. *Dichmann, Wright & Pugh,* 337 U. S. 801.

The fact that the Commission had ruled in the *Riss* case, prior to the administrative hearing in this case, that it considered the Administrative Procedure Act inapplicable to proceedings under Section 207, did not excuse Tucker's failure to raise a similar timely objection. Clearly, it would not under such statutes as the National Labor Relations Act which specifically require parties to first present their objections to the agency, and the same result should follow even where the statute happens to be silent. The related rule of exhaustion of administrative remedies is enforced by the courts even where it is shown that the administrative agency has previously decided the question and is unlikely to change its position. *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 487-488. Exhaustion of administrative remedies has been required even where the administrative agency previously had disclaimed jurisdiction to act. *Gilchrist* v. *Interborough Co.*, 279 U. S. 159, 207-208; *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 616-617 and cases cited. If the Commission had been informed through timely objections that a large number of the parties to proceedings under Section 207 were contending that the Administrative Procedure Act was applicable, it might well have followed a different course of action, such as complying with that Act out of abundance of caution, or asking Congress for clarifying legislation. Thus, since

the failure of such persons to raise the examiner issue before the Commission has resulted in the type of prejudice which invokes the doctrine of laches, that failure should not be excused.

The decision in the instant case also is in conflict with a subsequent decision by a three-judge district court in another circuit. In *W. J. Dillner Transfer Co.* v. *United States.* F. Supp. (W. D. Pa., Dec. 4, 1951) the court held that a competitor of a certified carrier who had failed to raise the objection that the examiner had not been appointed under the Administrative Procedure Act in a petition for rehearing with the Commission was precluded from raising it on judicial review, since the court "cannot properly consider matters not raised before the Commission when the plaintiff had a sufficient opportunity to do so." The pertinent portions of this opinion are set forth in Appendix B to this Statement. This conflict of decisions between different courts plainly indicates the need for a decision by this Court. The present conflict of decisions leaves the Commission in a serious quandary, particularly in the cases in which it issued certificates. If the certificates were validly issued, the Commission cannot revoke or cancel them except for cause. If they were not validly issued, then the Commission can and must reopen the proceedings.

This problem is particularly serious in this case because of the tremendous impact that the instant

decision may have upon the administration of the Interstate Commerce Act. Between the effective date of the Administrative Procedure Act and the Supreme Court decision in the *Riss* case, the Commission had granted approximately 2500 certificates of public convenience and necessity in proceedings where hearings were conducted by an examiner not appointed under the Administrative Procedure Act.[3] The instant decision casts doubt upon the validity of all of these certificates. Since there is no statute of limitations in proceedings to set aside Interstate Commerce Commission orders, unsuccessful protestants may, for a presumably indefinite period, subject only to the doctrine of laches, judicially challenge their competitors' operating authority. Three more court cases raising the examiner issue already have been filed.[4] In addition, since the decisions in the *Riss* case and the instant case, about 50 petitions for reconsideration have been filed with the Commission seeking rehearing before an examiner appointed pursuant to the Administrative Procedure Act. Moreover, there were many unsuccessful applicants for certificates during this period, who

[3] Interstate Commerce Commission, 65th Annual Report to Congress, pp. 52-53. Since the *Riss* decision, the Commission has assigned Section 207 applications for hearing to duly appointed examiners.

[4] *Pacific Intermountain Express* v. *United States*, Civil No. 30518, N.D. Calif., Southern Division (9th Cir.); *Pomprowitz* v. *United States*, Civil No. 5396, E.D. Wisc., (7th Cir.); *United Transports, Inc.* v. *United States*, Civil No. 1532, W.D. Texas, San Antonio Division (5th Cir.).

might also be able to reopen their cases under the instant decision.

The Commission in its latest annual report to Congress stated that redetermination of the cases originally heard by an examiner not meeting the requirements of the Administrative Procedure Act would be "utterly impossible with our present staff even if we had unlimited funds for this purpose on account of the difficulty of finding a sufficient number of competent employees to handle such a load."[5]

The District Court's conclusion that the Commission "did not have jurisdiction" because of the absence of an examiner appointed under the Administrative Procedure Act, is, we submit without foundation. Clearly, the Commission had jurisdiction over both the subject matter of the proceeding—the grant of a certificate of public convenience and necessity to a motor carrier operating in interstate commerce—and the parties thereto. Characterization of the examiner objection as "jurisdictional" cannot remove it from the

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[5] Interstate Commerce Commission 65th Annual Report, pp. 52-53:

A bill to deal with the problem raised by the *Riss* case has been introduced in Congress. H.R. 5045, 82d Cong., 2d sess., would amend Section 10(e) of the Administrative Procedure Act to provide that no action, findings or conclusions in any proceedings instituted under the Interstate Commerce Act prior to April 17, 1951, shall be set aside solely because an examiner appointed under the Act did not preside, unless objection thereto was made prior to that date or to the close of the hearing.

general rule precluding judicial consideration of objections not presented to the agency.

The decision of the district court in this case would compel the reopening of a large number of these certification proceedings on a procedural objection unrelated to the substantive merits of the application, and the possible invalidation of many certificates in reliance on which substantial investments undoubtedly have been made. Sound judicial and administrative practice dictates against such a result, particularly where the order involved was duly entered by the agency after full dress administrative proceedings admittedly conforming to the agency's procedural rules and unchallenged as to over-all fairness.

We believe that the question presented by this appeal is substantial and that it is of public importance.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

JANUARY 1952.

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

No. 7490 (3)

L. A. TUCKER TRUCK LINES, INCORPORATED, PLAINTIFF

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Before WOODROUGH, Circuit Judge, HULEN and HARPER, District Judges

MEMORANDUM OPINION

(Filed October 18, 1951)

HARPER, Judge:

This is an action by L. A. Tucker Truck Lines, Inc., to annul, set aside and enjoin an order of the Interstate Commerce Commission granting C. L. Cunningham, d/b/a Pemiscot Motor Freight Company, a common carrier by motor vehicle, additional operating authority to engage in interstate commerce over regular routes between specified points in the United States as more fully described in a certificate of public convenience and necessity issued to Pemiscot Motor Freight Company in accordance with the terms of the above described order. The case was heard by a court composed of three judges, pursuant to Section 2284 and 2325, Title 28, USCA.

Orders of the Interstate Commerce Commission are reviewable in this court. *United States* v. *Maher*, 307 U.S. 148. The Functions of the reviewing court are strictly limited. With respect to such limitations the Supreme Court in *Rochester Telephone Company* v. *United States*, 307 U.S. 125, l.c. 140, said: "Only questions affecting constitutional power, statutory authority and basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commissions' orders become incontestable."

The plaintiff (L.A. Tucker Truck Lines, Inc.) on the day of the trial sought leave to file an amended petition, raising in addition to what had been raised in its original petition the further fact that C. I. (Calvin I.) Kephart, the examiner who heard this matter for the Interstate Commerce Commission, had not at the time of the hearing been appointed an examiner pursuant to Section 11 of the Administrative Procedure Act (Public Law 404—79th Congress, Title 5, U.S.C., Sec. 1010). The court reserved ruling on the plaintiff's motion to amend its petition. Proof was introduced to the effect that on January 27, 1949, the date of the hearing in No. MC-105120 (Sub-No. 3), Pemiscot Motor Freight Company, Calvin I. Kephart had not been appointed an examiner pursuant to Section 11 of the Administrative Act.

The Supreme Court in the case of *Riss & Company, Inc.* v. *United States*, 341 U.S. 907, held that Interstate Commerce Commission hearings must be held by examiners appointed to conform with the requirements of the Administrative Procedure Act.

Before considering the merits of the order in question we consider the validity of the order, since Kephart, the hearing examiner, was not qualified as a hearing examiner pursuant to the Administrative Procedure Act. The Supreme Court in the case of *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, l.c. 53, said: "We hold that deportation proceedings must conform to the requirements of the Administrative Procedure Act, if resulting orders are to have validity."

While the Wong Yang Sung case was one dealing with personal rights and this action deals with property rights, yet a distinction should not be drawn between the two as the Administrative Procedure Act applies to both. The Supreme Court in *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Company*, 227 U.S. 88, l.c. 91, said: "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence.'"

Judge Hincks, District Judge for Connecticut, in the case of *General Broadcasting System* v. *Bridgeport B. Station*, 53 F. 2d 664, l.c. 668, said: "The field of the superior body being narrow under the express provisions of the act, the matter is one for the application of the rule that acts of an administrative body which do not come clearly within the powers granted to it by the Legislature are void."

The United States Court of Appeals for the District of Columbia in *Heitmeyer* v. *Federal Communications Commission*, 95 F. 2d 91, l.c. 100, said: "Proper administration of the law by governmental agencies such as the Communications Commission requires careful observance of the procedures established by Congress. For the protection of the people generally, to say nothing of the agencies themselves, convenience of administration cannot be permitted to justify noncompliance with the law, or the substitution of fiat for adjudication."

In a matter similar to this action, the California courts *have held in National Automobile & Casualty Ins. Co.* v. *Downey* 220 Pac. 2d 962, l.c. 967, as follows: "Since the agency did not have jurisdiction, in that the proceeding under review had not been heard by a properly qualified person, the result is that the issues had not been determined first or at all by the administrative agency. Therefore, the court properly refrained from determining the sufficiency of the evidence."

Amendments to pleadings are largely discretionary with the courts and the courts have repeatedly held that amendments to pleadings should be allowed with great liberality at any stage of the proceedings unless violative of settled law or prejudicial to rights of opposing parties. The courts have been very liberal in permitting amendments where it is necessary to bring about a furtherance of justice.

The cases referred to above and many not cited would indicate that the order entered by the Interstate Commerce Commission is void and to

deny the right of the L. A. Tucker Truck Lines, Inc., to file its amended petition would only add to confusion. Even if that were not true, we are of the opinion that the amendment should be permitted in the interest of justice. "It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points. So, when a District Court has not made findings in accordance with our controlling rule (Equity Rule 70½) it is our practice to set aside the decree and remand the cause for further proceedings." *Ford Motor Co.* v. *National Labor Relations Board,* 305 U.S. 364, l.c. 373.

In numerous cases causes have been remanded to the Interstate Commerce Commission by the district courts for appropriate action in accordance with the opinion of the court. The right of the plaintiff, L. A. Tucker Truck Lines, Inc., to file its first amendment to its petition is granted, the order of the Commission dated August 7, 1950, is set aside and the cause remanded to the Commission for such action as it may deem appropriate, and in accordance with this opinion.

JOSEPH W. WOODROUGH,
United States Circuit Judge;
RUBEY M. HULEN,
United States District Judge;
ROY W. HARPER,
United States District Judge.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action

No. 8677

W. J. DILLNER TRANSFER CO., PLAINTIFF

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

U. S. A. C. TRANSPORT, INC., INTERVENOR-DEFENDANT

Before STALEY, Circuit Judge, and BURNS and STEWART, District Judges

OPINION AND ORDER

OPINION

STEWART, District Judge.

The plaintiff, W. J. Dillner Transfer Company, brings this action to vacate and set aside two orders of the Interstate Commerce Commission relative to the application of one U.S.A.C. Transport, Inc. for an extension of authority to authorize it to transport airplanes or parts thereof between various points in the United States. The application for extension of authority was filed on May 27, 1948. On April 11, 1949, after a series of hearings conducted in various parts of the United States, F. Roy Linn, one of the examiners for the Interstate Commerce Commission filed a report and recommended an order proposing to grant the application of U.S.A.C. Transport, Inc. Thereafter, on October 19, 1949, the Local Cartage National Conference, Inc. filed a petition for leave

to intervene, reopen, rehear and vacate the recomended order granting certificate to U.S.A.C. Transport, Inc. (hereinafter referred to as "petition for rehearing"). Annexed to this petition was a list of the members of the Heavy Hauling, Machinery Moving & Erecting Section of the Local Cartage National Conference, Inc.; W. J. Dillner Transfer Co., plaintiff here, was listed as such a member and therefore may be treated as having been effectually a party to the petition for rehearing. On December 3, 1949, the Interstate Commerce Commission denied the petition for rehearing and subsequently, on January 18, 1950, granted and issued to U.S.A.C. Transport, Inc. a Certificate of Public Convenience and Necessity. These are the two orders involved in this proceeding.

Subsequently, plaintiff moved for summary judgment, under the theory that only questions of law were involved. Although plaintiff was given opportunity to do so, and although defendants offered a number of exhibits in support of their opposition to the prayers of plaintiff, plaintiff elected to offer no testimony in support of its case. Thus, the hearing on the motion for summary judgment constituted a final hearing of the case.

A motion for summary judgment may be granted only where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"; Rule 55(c) Federal Rules of Civil Procedure, 28 U.S.C. following § 723c. *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, 130 F. 2d 1016 (3rd Cir. 1942);

U. S. v. *Costa* 11 F.R.D. 492 (W.D. Pa. 1951); *Michel* v. *Meier*, 8 F.R.D. 464 (W.D. Pa. 1948). All doubts are resolved against the moving party. *Sarnoff* v. *Ciaglia*, 165 F 2d 167 (3rd Cir. 1947).

Plaintiff contends that the two orders referred to above should be vacated and set aside as a matter of law on either of two grounds and that none of the fact issues involved are material thereto. First, plaintiff argues that it did not have the formal notice of the hearings on the U.S.A.C. application required by the general order of the Commission issued pursuant to §§ 205(e) and 206(b) of the Interstate Commerce Act, 49 U.S.C. §§ 305(e) and 306(b). Second, plaintiff contends that the orders should be vacated for the reason that the hearings on the application of U.S.A.C. Transport, Inc., were held before a hearing officer of the Commission who was not a hearing officer appointed under the Administrative Procedure Act, 5 U.S.C. §§ 1001 et seq.[6]

Plaintiff's second objection relating to the qualification of the hearing officers remains for disposition. A consideration of the petition for rehearing is important in determining this question. Since this was a petition for rehearing, petitioner was required to comply with the General Rules of Practice of the Commission. Rule 101(b) provides:

> "(b) *Rehearing or further hearing.* When in a petition filed under this rule opportunity is sought to introduce evidence, the evidence

[6] Riss & Co., Inc. v. U. S., 341 U.S. 907 (1951) has set at rest the question as to whether a hearing examiner of the Interstate Commerce Commission must be qualified and appointed under the Administrative Procedure Act.

to be adduced must be stated briefly, such evidence must not appear to be cumulative, and explanation must be given why such evidence was not previously adduced."

Rule 101(d) provides:

> "(d) *Reconsideration.* If relief under this rule other than under subdivisions (b) and (c) is sought, the matters claimed to have been erroneously decided and the alleged errors or relief sought must be specified with the particularity respecting exceptions as outlined in rule 96(a), as should also any substitute finding or other substitute requirement desired by petitioner."

The petition failed to meet the requirements of these rules, at least with respect to the question of the qualifications of the hearing officers. In fact, it gave no hint of the hearing officer in question. This issue was raised for the first time in this Court. Clear judicial expression supports the doctrine that failure to raise objections so as to permit consideration thereof by the Commission, bars review of such objections when raised for the first time in a judicial proceeding of this type. In *United States* v. *Hancock Truck Lines, Inc.*, 324 U.S. 774 (1945), the Supreme Court of the United States held that it was manifestly improper for a reviewing court to reverse the Commission's order in respect to a provision therein as to which the suitor had expressly waived objection. Relying on this case, the District Court for the District of Massachusetts held, in *General Transportation Co.* v. *United States*, 65 F. Supp. 981 (D. Mass., 1946), affirmed per curiam 329 U.S.

668 (1946) rehearing denied 329 U.S. 827 (1946), that a point not made before the Commission was not properly before the Court for consideration. In reaching this conclusion, the Court stated at page 934:

> "To be sure the plaintiff here, when appearing as protestants before the Commission, did not expressly waive the point they now make, and in this respect the case at bar differs from the Hancock case. Nevertheless the reasoning of that case is applicable, and furthermore, although strictly speaking we are not an appellate court, we in reality are called upon to exercise appellate functions, and from this we think it follows that we should apply general principles applicable on review."

This action is a review, not a *de novo* proceeding, and therefore this Court cannot properly consider matters not raised before the Commission when the plaintiff had a sufficient opportunity to do so.

Although we are not called upon to proceed further, we do note that we have carefully examined the record before the Interstate Commerce Commission to determine whether the order of the Interstate Commerce Commission was void within the meaning of the rule set forth by the Supreme Court of the United States in *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U.S. 88 at 91 (1913); and we are satisfied that substantial justice was done on the basis of the record before the Interstate Commerce Commission.

Therefore, the motion for summary judgment will be denied and the orders objected to will be affirmed.

☆ U. S. GOVERNMENT PRINTING OFFICE 1952 891651 941

No. 18

In the Supreme Court of the United States

OCTOBER TERM, 1952

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

L. A. TUCKER TRUCK LINES, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

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OPINION BELOW

The opinion of the district court (R. 88) is reported in 100 F. Supp. 432.

JURISDICTION

The final judgment of the district court was entered on December 7, 1951 (R. 94). The petition for appeal was presented and allowed on January 28, 1952 (R. 95-96). The jurisdiction of this Court

is conferred by 28 U.S.C. 1253, 2101(b) and 2325. Probable jurisdiction was noted on March 24, 1952 (R. 103).

QUESTION PRESENTED

Appellee, a motor carrier, intervened in proceedings before the Interstate Commerce Commission in opposition to an application, pursuant to Section 207(a) of Title II of the Interstate Commerce Act, by another motor carrier for a certificate of public convenience and necessity authorizing an extension and modification of the applicant's operating rights. The hearings were conducted by an examiner of the Commission not appointed pursuant to Section 11 of the Administrative Procedure Act. Appellee raised no question as to the examiner's qualifications at the time of the hearing, in the exceptions which it filed to the examiner's recommended report and order, in its petition for reconsideration of the order entered by a Division of the Commission, in its petition to the Commission for "extraordinary relief," or in the complaint which it filed in the court below to have the Commission's order set aside. More than eight months after institution of this suit, appellee filed a motion for leave to amend its complaint, by adding thereto the allegation that the Commission's order was void because the hearing examiner had not been appointed pursuant to Section 11 of the Administrative Procedure Act.

The question presented is whether an intervenor in a Commission proceeding is entitled to have the Commission's order set aside because the hearing

examiner had not been appointed pursuant to the Administrative Procedure Act, when the intervener did not raise this issue at any time during the administrative proceeding.

STATUTES INVOLVED

Section 207(a) of Part II [1] of the Interstate Commerce Act, 49 Stat. 543, 551, 49 U.S.C. 307(a), provides in part as follows:

> Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied * * *.

The Administrative Procedure Act of June 11, 1946, 60 Stat. 237, 5 U.S.C. 1001, *et seq.*, provides in part as follows:

> Sec. 5. In every case required by statute to be determined on the record after opportunity for an agency hearing * * *—
>
> * * * * * *

[1] Part II of the Act applies to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce. Section 202(a) of Interstate Commerce Act, 49 U.S.C. 302(a).

(c) SEPARATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision * * *. * * * nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of any investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency. [5 U.S.C. 1004.]

* * * * *

Sec. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; * * *. * * * Any such officer may at any time with-

draw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case. [5 U.S.C. 1006.]

* * * * * *

Sec. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining ap-

plications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires. [5 U.S.C. 1007.]

* * * * *

Sec. 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable.

* * *

STATEMENT

In June 1948, C. L. Cunningham, doing business as Pemiscot Motor Freight Co., filed with the Interstate Commerce Commission an application under 207(a) of the Interstate Commerce Act for a certificate of public convenience and necessity authorizing it to operate as a common carrier by motor vehicle more extensively than was authorized by Pemiscot's existing certificate of convenience and necessity (R. 55). Ten motor carriers, including the appellee, as well as a railroad and its motor carrier affiliate, intervened in opposition to the application (R. 28, 32). A hearing on the application was held before an examiner of the Commission in January 1949, and the testimony of numerous supporting and opposing witnesses was received and 17 exhibits were introduced (R. 15, 18-22).

Following such hearing, the examiner submitted a recommended report and order (R. 14-26), and appellee and certain other interveners filed exceptions thereto (R. 2, 37). The matter came before Division 5 of the Commission, which filed a report on January 13, 1950, finding that Pemiscot was entitled to a certificate granting, with minor exceptions, the operating authority which it sought (R. 27, 38). Appellee's petition for reconsideration by the full Commission was denied on May 4, 1950, and its later petition for "extraordinary relief" was rejected on June 29, 1950 (R. 3). The Commission thereupon issued to Pemiscot a certificate of public convenience and necessity, dated

August 7, 1950, conforming to the findings made by Division 5 (R. 4, 43-44).

On September 12, 1950, appellee filed in the court below a petition to have the Commission's certificate to Pemiscot set aside "insofar as the matters herein complained of are concerned" (R. 1, 5). The ground upon which the certificate was attacked was that the evidence failed to show any need for transportation service by Pemiscot between St. Louis, Missouri, and Sikeston, Missouri (R. 3).[2]

The examiner who presided at the Commission hearing had not been appointed pursuant to Section 11 of the Administrative Procedure Act. No objection to the qualifications of the hearing examiner was made during the course of the administrative proceedings, either by the appellee or by any other party to the proceeding. Appellee likewise did not raise this issue when it instituted the present suit to have the Commission's order set aside. Appellee first raised this issue on May 25, 1951, when it filed with the district court a motion for leave to amend its petition (R. 49, 89). Appellee, in seeking to interject this new issue into the case, relied upon the ruling made by this Court in *Riss & Co.* v. *United States,* 341 U.S. 907. That *per curiam* ruling, rendered on April 16, 1951, held that hearings on applications for certificates of convenience and necessity under Section 207(a) of the Interstate Commerce Act are subject to the

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[2] The St. Louis-Sikeston service was a relatively minor part of the additional operating authority conferred by the Commission's certificate (R. 43-44).

provisions of the Administrative Procedure Act governing the qualifications of officers who preside at the taking of evidence in administrative hearings.

The district court permitted appellee to amend its petition and, solely on the basis of the issue interjected by the amendment, entered judgment setting aside the Commission's order (R. 91). The court appears to have been of the opinion that the order of an administrative body is null and void if the officer who had presided at the taking of the evidence was not appointed in accordance with Section 11 of the Administrative Procedure Act (R. 89-90). The court also refused to give effect to the established rule that an administrative order may not be attacked upon grounds which were not presented to the administrative agency issuing the order.

SUMMARY OF ARGUMENT

In *Riss & Co.* v. *United States,* 341 U.S. 907, this Court held that hearing officers who conduct administrative hearings on applications for motor carrier certificates of public convenience and necessity under Section 207(a) of the Interstate Commerce Act must be appointed in accordance with Section 11 of the Administrative Procedure Act. However, in the instant case, it was error for the court below to set aside the Commission's grant of a certificate of public convenience and necessity in a suit brought by an intervening and competing carrier, on the ground that the administrative hearing was conducted by an officer who had not been

appointed pursuant to Section 11, where such objection was not raised in the proceedings before the Commission.

The appellee was charged with notice that the Interstate Commerce Commission was assigning motor carrier applications under Section 207(a) for hearing before officers who had not been appointed as hearing examiners pursuant to Section 11 of the Administrative Procedure Act. Also, the appellee had ample opportunity to raise this issue in the proceedings before the Commission.

Appellate courts regularly refuse to consider objections which were not presented to trial courts. Applying this analogy, Federal courts have long refused to consider objections to administrative action which were not presented to the administrative agency. This principle has been applied not only to questions of procedure, but also to the allegedly erroneous admission or exclusion of evidence and even to the alleged denial of rights guaranteed by the Constitution. In recent years, Congress has affirmed this principle of judicial administration by specifically providing in many Federal regulatory statutes that objections not presented to the administrative agency shall not be considered by the reviewing courts. The Federal courts have strictly enforced such statutory provisions and they have continued to apply their principle even in cases under statutes, such as the Interstate Commerce Act, which contain no such express provision.

The court below erroneously concluded that the conduct of the administrative hearing before an officer who was not appointed in accordance with Section 11 of the Administrative Procedure Act deprived the Commission of "jurisdiction" and rendered its order void. Clearly, the Commission had jurisdiction in the true sense that it was expressly empowered by Congress to determine whether an application for a certificate of public convenience and necessity under Section 207 should be granted over the appellee's objection. Moreover, even true issues of "jurisdiction" must be raised before the administrative agency before they may be considered by the courts, just as the agency's alleged lack of jurisdiction does not justify a complete failure to exhaust administrative remedies. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51. Specifically, this Court and the lower Federal courts have repeatedly held that the failure to raise promptly the alleged disqualification of Federal trial judges or administrative hearing officers, even on such prejudicial grounds as bias or interest, precludes consideration of such objections by appellate or reviewing courts. Moreover, administrative hearing officers play far less decisive roles than Federal judges, particularly in proceedings on applications for "initial licenses," as in the instant case. Section 7(a) of the Administrative Procedure Act expressly requires timely objection to the qualifications of hearing officers.

The fact that the Interstate Commerce Commission had previously, prior to this Court's decision in the *Riss* case, taken the position that proceedings under Section 207 were not governed by the Administrative Procedure Act does not justify the appellee's failure to present its objection to the Commission. This Court has held that possibilities of administrative relief or reconsideration must be exhausted notwithstanding the fact that the administrative agency has already taken a position on the matter in issue.

Under any balancing of equities in this and similar cases, the absence of injury to the appellee, coupled with the expense and inconvenience to other parties and to the Commission of rehearings, requires application of the rule that courts will not consider objections which were not presented to the administrative agency. The appellee does not even assert that it was actually prejudiced by the fact that the administrative hearing was conducted by a hearing officer who had not been appointed pursuant to Section 11. Moreover, the application of the Administrative Procedure Act to cases under Section 207(a) of the Interstate Commerce Act is so limited that prejudice cannot be presumed. In the instant case, the application for a modification and extension of motor carrier operating authority was an application for an "initial license," as in the case of an application for an original certificate of public convenience and necessity. Section 5(c) of the Administrative Procedure Act exempts from the separation of functions re-

quirements of the Act the determination of "applications for initial licenses." Similarly, the requirement of Sections 5(c) and 8(a) that in cases of adjudication the intermediate or recommended decision must be prepared by the hearing officer who heard the evidence, is modified by Section 8(a) which provides that in determining applications for initial licenses the agency may itself issue a tentative decision or any of its responsible officers may make the recommended decision. That is, the Administrative Procedure Act has its lightest impact in cases such as the instant case.

Consistent with the rationale of these significant exceptions for determining "applications for initial licenses," the Commission's role in proceedings under Section 207(a) is entirely non-adversary in the great majority of cases. Typically, the Commission relies upon the applicant and its intervening competitors to adduce the evidence and the Commission acts as the arbiter of competing economic interests, rather than as a prosecutor-judge. Cf. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33. Thus, not only is the instant type of case in large part exempt from the Administrative Procedure Act, but also it does not present the conditions at which the Act was directed. Under these circumstances, it cannot be presumed that the appellee was prejudiced by the proceedings before the Commission in which it participated without objection.

On the other hand, if the decision below is affirmed, there will be opened to challenge, unless barred by laches, approximately 2,500 motor com-

mon carrier certificates issued under Section 207(a) and contract carrier permits under the similar provisions of Section 209. In addition to the expense to the Commission of a substantial number of rehearings, motor carriers who have extended service and made investments in reliance upon such authorizations will be harassed by the inconvenience and expense of new hearings. Assuming, therefore, that questions which were not presented to the administrative agency can be considered by a reviewing court to avoid obvious and substantial injustice, no such showing can be made here. Rather, the considerations which invoke the doctrine of laches require that the appellee's failure to object to the hearing officer's qualifications during the proceedings before the Commission bar consideration of that objection by the courts.

ARGUMENT

The District Court Erred in Setting Aside the Commission's Order Upon the Ground That the Hearing Officer Was Not Appointed in Accordance with Section 11 of the Administrative Procedure Act, Where No Such Objection Was Made During the Proceedings Before the Commission

We contend that the court below erred in setting aside the Commission's order on the ground that the administrative hearing was conducted by a hearing examiner who was not appointed in accordance with Section 11 of the Administrative Procedure Act, where that objection was not raised during the proceedings before the Commission. This issue was neither presented to nor decided by

this Court in *Riss & Co.* v. *United States*, 341 U. S. 907, since in that case the objection to the examiner's qualifications had been specifically raised during the Commission proceedings, once during the hearing and again by Riss' petition for reconsideration.[3] Since the *Riss* decision, the Interstate Commerce Commission has conducted proceedings under Section 207 (a) of the Interstate Commerce Act in full compliance with the Administrative Procedure Act, and we are not seeking to reargue the *Riss* case. The instant case is concerned only with the validity of hundreds of orders issued by the Commission under Section 207 (a) prior to the *Riss* decision, and after proceedings in which none of the parties objected to the qualifications of the Commission's hearing officers.

A. *The appellee had ample opportunity during the proceedings before the Commission to object to the hearing officer's qualifications.*

The appellee was charged with knowledge, during the pendency of the Commission proceeding, that the Commission interpreted the hearing-officer requirements of the Administrative Pro-

[3] In the *Riss* case Riss itself had sought a certificate of convenience and necessity to extend its own operations, and discovered on the last day of the hearings that the examiner had not been appointed under the Administrative Procedure Act. Riss formally objected to the conduct of the proceedings on this ground. The objection was disallowed, and Division 5 of the Commission, following the examiner's recommendation, denied the certificate application on the merits. The full Commission denied a petition for reconsideration in which the examiner issue was again raised.

cedure Act as not applying to hearings on applications for certificates of convenience and necessity under Section 207(a) of the Interstate Commerce Act. Moreover, appellee had ample opportunity to raise before the Commission the question of whether the hearing officer had been appointed an examiner pursuant to Section 11 and ample opportunity to object upon the ground that he had not been so appointed.

The provisions of Sections 5, 7, 8 and 11 of the Administrative Procedure Act apply to cases of adjudication (and rule making) "required by statute to be determined on the record after opportunity for an agency hearing." Upon the enactment of the Administrative Procedure Act, the Department of Justice took the position that the quoted language from Section 5 made Sections 5, 7, 8 and 11 "applicable only where Congress has otherwise specifically required a hearing to be held."[4] Consistent with this interpretation, and since Section 207 (a) of the Interstate Commerce Act does not in terms require a hearing on applications for motor carrier certificates of public convenience and necessity, the Commission concluded that administrative hearings on such applications were not governed by the Administrative Procedure Act.

On February 20, 1950, this Court held, in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, that the ref-

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[4] *The Attorney General's Manual on the Administrative Procedure Act* (1947) p. 41.

erence in Section 5 to hearings "required by statute" included hearings "the requirement for which has been read into a statute by the Court in order to save the statute from invalidity." 339 U. S. at 50. The *Sung* case was decided *after* the hearing before the hearing examiner in this case and in many similar cases had been completed and, in many cases, after the Commission had issued final orders in such cases. Also, the *Sung* case related to deportation proceedings under the Immigration Act in which it had been held that due process of law required an opportunity for hearing, while it had not been authoritatively determined that due process required opportunity for a hearing on an application for a certificate of public convenience and necessity, i.e., a license.

In the meantime, Riss & Co. and various other parties to proceedings under Section 207(a) had objected during the administrative proceedings to the qualifications of the Commission's hearing officers, and the Commission had uniformly overruled such objections. Moreover, the opinion in *Riss & Co.* v. *Interstate Commerce Commission*, 179 F. 2d 810 (C.A.D.C.), decided on January 12, 1950, recited that the Commission had ruled that Section 5 of the Administrative Procedure Act does not apply to proceedings under Section 207(a) of the Interstate Commerce Act. On October 17, 1950, a three-judge district court held in *Riss & Co.* v. *United States*, 96 F. Supp. 452, that hearings in cases under Section 207(a) were not governed by the Administrative Procedure Act

and, therefore, need not be conducted by examiners appointed under Section 11.

Appellee was given advance notice of who was to preside at the hearing on January 27, 1949.[5] Appellee therefore had opportunity, at the outset, to object. Furthermore, appellee actively participated in the administrative proceeding, which continued at least until June 29, 1950.[6] In August 1949 appellee filed exceptions to the examiner's recommended report and order (R. 66); in March 1950 it filed a petition for reconsideration of the report and order of Division 5 (R. 83); and in June 1950 it filed a further petition for relief (R. 80). At none of these times did the appellee object to the hearing officer's qualifications, although in January 1950 the Court of Appeals for the District of Columbia referred in its opinion to the Commission's view that the Administrative Procedure Act was inapplicable.

At any time during this period appellee might easily have ascertained that the hearing officer had not been appointed an examiner pursuant to Section 11. A letter of inquiry addressed to the Interstate Commerce Commission or to the Civil Service Commission would have elicited this information.

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[5] On January 11, 1949, the Commission mailed to appellee a copy of its order referring Pemiscot's application to "Examiner C. I. Kephart" for hearing on January 27, 1949.

[6] This was the date on which the Commission rejected appellee's petition for "extraordinary relief" (*supra*, p. 7). Perhaps the administrative action should not be regarded as final until August 7, 1950, the date on which the Commission issued a certificate of convenience and necessity granting to Pemiscot additional operating authority (R. 43-44).

Indeed, inquiry of the Commission was the means by which appellee obtained its information in May 1951, when it first interjected the issue of the qualifications of the Commission's hearing officer, by moving in the court below for leave to amend its petition to have the Commission's orders set aside or modified.[7]

B. *Since the appellee failed to object to the hearing officer's lack of qualifications during the proceedings before the Commission, the Commission's order could not be set aside on that ground.*

The court below should have refused to consider the objection, raised for the first time in that court, that the hearing officer who presided over the administrative hearing had not been appointed pursuant to Section 11 of the Administrative Procedure Act. In reviewing action of an administrative agency taken after a hearing, courts will not consider issues which were not presented to the agency. This rule has been applied where inadmissible evidence has been received without objection. *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, 130; *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 155. Such constitutional rights as

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[7] The motion was made on May 25, 1951 (R. 49). On May 19, 1951, appellee's counsel had sent a telegram to the Commission asking whether at the time of the hearing on January 27, 1949, the Commission's hearing officer had been appointed an examiner pursuant to Section 11 of the Administrative Procedure Act. By letter dated May 21, 1951, the Commission replied in the negative.

the privilege against self-incrimination are deemed waived by the failure to assert them during the administrative proceeding. *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 113. The rule has been applied to require that newly acquired evidence be offered to the administrative agency promptly. Thus, *United States* v. *Northern Pacific Ry.*, 288 U.S. 490, was an appeal from a district court decision enjoining enforcement of an Interstate Commerce Commission order establishing rates on petroleum. The basis for the injunction was that the Commission had abused its discretion in refusing to reopen the proceeding and receive proof of changes in economic conditions arising after the closing of evidence. In reversing the decision, the Supreme Court said (p. 494):

> Though the order substantially reduced the carriers' revenues, we do not consider the merits of the application for rehearing, as we think the carriers' lack of diligence in bringing this matter to the Commission's attention deprived them of any equity to complain of the refusal of their petition. They sat silent and took the chance of a favorable decision on the record as made. They should not be permitted to reopen the case for the introduction of evidence long available and susceptible of production months before the Commission acted. The denial of a rehearing, in view of this delay, was not such an abuse of discretion as would warrant setting aside the order.

In the *Spiller, Vajtauer* and *Northern Pacific* cases, this Court was applying by analogy the rule that an appellate court will not consider issues which were not presented to the trial court.

Congress has repeatedly affirmed this judicially formulated rule by writing it into many recent regulatory statutes. Thus, in the Securities Act of 1933[8] Congress specifically provided that, "No objection to the order of the Commission shall be considered by the [reviewing] court unless such objection shall have been urged before the Commission." An identical provision was inserted in the Securities Exchange Act of 1934,[9] while the Public Utility Holding Company Act,[10] the Investment Companies Act[11] and the Fair Labor Standards Act[12] provide that "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do." The National Labor Relations Act,[13] both as originally enacted and as amended in 1947, has provided that "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Such statutory commands

[8] 48 Stat. 74; 15 U.S.C. 77a, 77i.
[9] 15 U.S.C. 78y.
[10] 15 U.S.C. 79x.
[11] 15 U.S.C. 80a-42.
[12] 29 U.S.C. 210.
[13] 29 U.S.C. 160(e).

have been fully enforced by this Court. In *Marshall Field & Co.* v. *N.L.R.B.*, 318 U. S. 253, 255-256, this Court stated that such a provision makes "presentation [of an objection] to the Board a prerequisite to judicial review." In *N.L.R.B.* v. *Cheney California Lumber Co.*, 327 U. S. 385, 389, it was said that "By this provision, Congress has said in effect that in a proceeding for enforcement of the Board's order the court is to render judgment on consent as to all issues that were contestable before the Board but were in fact not contested." [14]

After, as well as before, the appearance of such statutory provisions, the courts have applied the rule in the review of administrative action pursuant to statutes containing no such provision. Thus, in *United States* v. *Capital Transit Co.*, 338 U. S. 286, 291, this Court refused to consider the contention that the rates fixed by the Interstate Commerce Commission were confiscatory, upon the ground that this issue had not been properly presented to the Commission and therefore was not "ripe for judicial review." See also *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 525. In suits to set aside orders of the Interstate Commerce Commission, specially-constituted three-judge district courts have consistently refused to consider objections which had not been presented to the Commission. *W. J. Dillner Transfer Co.* v. *United*

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[14] Accord, *May Department Stores Co.* v. *N.L.R.B.*, 326 U.S. 376, 386, n. 5; *N.L.R.B.* v. *Bradford Dyeing Ass'n*, 310 U.S. 318, 341.

States, 101 F. Supp. 506, 509-510 (W. D. Pa.), now pending on appeal to this Court, No. 77; *Carolina Scenic Coach Lines* v. *United States,* 56 F. Supp. 801, 804-805 (W.D. N.C.), affirmed, 323 U. S. 678; *General Transportation Co.* v. *United States,* 65 F. Supp. 981, 984 (D. Mass.), affirmed, 329 U.S. 668; *Transamerican Freight Lines* v. *United States,* 51 F. Supp. 405, 412 (D. Del.).

In applying the rule to the appellate review of lower court decisions, this Court has stated that "This practice is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact." *United States* v. *Atkinson,* 297 U. S. 157, 159. To the extent that administrative agencies and courts are coordinate branches of government rather than members of the same hierarchy, *F.C.C.* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 143-144, the reasons for requiring that objections be presented initially to the administrative agency are even more compelling. As this Court put it, in *Unemployment Compensation Commission of Alaska* v. *Aragon,* 329 U.S. 143, 155, "A review court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action."

The application of the rule to the instant case may not be avoided upon the theory that the Com-

mission was deprived of "jurisdiction" [15] and its order was void because the hearing examiner was not appointed pursuant to Section 11 of the Administrative Procedure Act. The Commission admittedly had "jurisdiction" in the true sense that it was empowered by Congress to decide whether Cunningham's application should be granted over the appellee's objections. In any event, even if a genuine issue of jurisdiction were involved, the appellee could not raise such issue for the first time in the reviewing court, just as a party complaining of administrative action cannot obtain relief from the courts if it has altogether ignored its administrative remedy. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51; *Macauley* v. *Waterman S.S. Corp.*, 327 U. S. 540. Thus, in the *Myers* case an employer was required to present first to the National Labor Relations Board its claim that it was not engaged in interstate commerce and was therefore not subject to the National Labor Relations Act. Similarly, in the *Macauley* case, a claim that certain contracts were not subject to the Renegotiation Act was required to be presented first to the administrative agency. In both cases, it is clear that if, as in this case, there had been administrative hearings plus a failure to raise such "jurisdictional" issues during the hearings, the courts would have refused to consider such issues.

The court below relied heavily upon the decision of a California District Court of Appeals in *Na-*

[15] See dissenting opinion in *Yonkers* v. *United States*, 320 U.S. 685, 695.

tional Automobile & Casualty Ins. Co. v. *Downey*, 98 Cal. App. 2d 586, 220 P. 2d 962. In that case, a California statute prescribing qualifications for administrative hearing officers was enacted prior to the commencement of the administrative hearing in question, but did not become effective until after the hearing had been in progress for three months. The officer conducting the hearing admittedly lacked the new statutory qualifications and, absent a saving clause in the statute, the California court set aside the order which resulted from the administrative hearing. While in that case the State contended that there had been no timely request for the appointment of a qualified hearing officer, the court pointed out that during the administrative hearing and as soon as the statute became effective, the private party had repeatedly raised the issue of its application. Thus, the decision has no bearing on this case.

More persuasive analogies lie in the decisions of the Federal courts as to the validity of the official acts of judges whose disqualifications were not timely challenged. Thus, the alleged disqualification of a Federal judge for bias or interest under Sections 20 and 21 of the Judicial Code (now 28 U.S.C. 144, 455) is waived by failure to object during the proceedings before such judge, and his official acts performed without timely objection are valid. *Laughlin* v. *United States*, 151 F. 2d 281 (C.A. D.C.), certiorari denied, 326 U.S. 777; *Kramer* v. *United States*, 166 F. 2d 515 (C.A. 9); *In re Fox West Coast Theatres*, 25 F. Supp. 250,

259 (S.D. Cal.), affirmed, 88 F. 2d 212 (C.A. 9), certiorari denied, 301 U.S. 710, rehearing denied, 302 U.S. 772; *Borough of Hasbrouck Heights, N. J.* v. *Agrios*, 10 F. Supp. 371, 374 (D. N.J.).

A similar rule of waiver has developed under what is now 28 U.S.C. 47, which presently reads that, "No judge shall hear or determine an appeal from the decision of a case or issue tried by him." While this Court has held that litigants may not by their consent enable the trial judge to participate in the decision of the case in the Court of Appeals, *Rexford* v. *Brunswick-Balke-Collender Co.*, 228 U. S. 339, 344; *Wm. Cramp Sons* v. *Curtiss Turbine Co.*, 228 U. S. 645, 650, it later said, in *Delaney* v. *United States*, 263 U. S. 586, 588-589:

> The section seems not to have attracted the attention or appreciation of petitioner until he had experimented with other means of review and relief from the conviction adjudged against him. It may be that he did not thereby waive the section which may express a policy and solicitude in the law to keep its tribunals free from bias or prejudgment, rather than to afford a remedy to a litigant, yet it would seem that he should not be permitted to assume the competency of the tribunal to decide for him and its incompetency to decide against him. His action certainly suggests the idea that it was an afterthought with him that he was at any time in the situation from which the section was intended to relieve.

Since the *Delaney* case, the Courts of Appeals for the Fifth and Seventh Circuits have held that this

objection is raised too late by a petition for rehearing in the Court of Appeals. *Tinkoff* v. *United States,* 86 F. 2d 868, 884 (C. A. 7), certiorari denied, 301 U. S. 689, rehearing denied, 301 U. S. 715; *Lee* v. *United States,* 91 F. 2d 326, 332 (C.A. 5), certiorari denied, 302 U. S. 745.

Since actual bias, interest or disqualifications under 28 U.S.C. 47 is to be deemed waived in the absence of a timely objection, it follows that the objection that a hearing examiner was not appointed in accordance with Section 11 of the Administrative Procedure Act—a circumstance which is not even alleged to have actually prejudiced the appellee—should also be considered as waived by the failure to raise it. Moreover, since hearing examiners employed by Federal administrative agencies play far less decisive roles than Federal judges,[16] there is the greater reason to insist upon timely objection to their qualifications.

In proceedings under Section 207 (a) the analogy of the Commission and its examiners to judges is usually accurate. An application for a certificate of public convenience and necessity authorizing new motor carrier operations customarily touches the competitive interests of numerous other carriers. These carriers routinely intervene in such

[16] This is true even under the holding of *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 496, that depending "largely on the importance of credibility in the particular case", "evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion."

proceedings for the protection of their interests. The Commission makes no independent pre-hearing investigation of applications, but leaves it to the carriers concerned to adduce evidence pro and con on the issues of convenience and necessity and the qualifications of the applicant. Only rarely, as in the *Riss* case, is the Commission represented by counsel in the hearing before the examiner. That is, these are not cases in which, as in the deportation proceedings involved in *Wong Yang Sung* v. *McGrath, supra,* the dispute is between individuals and the Government; rather, the Commission is acting as arbiter between conflicting private economic interests. This typically non-adversary role of the Commission in proceedings under Section 207 (a) (which the Administrative Procedure Act recognizes in its significant exceptions for proceedings on applications for initial licenses, *infra,* pp. 33-35) warrants application of the analogous rule that a failure to challenge a Federal judge as disqualified constitutes a waiver of such objection. Here, as in judicial proceedings, belated objections chiefly serve to harass the other private parties to the proceedings—such as the applicant for a certificate in this case.

It should also be noted that the decision below is in square conflict with recent decisions of other Federal courts. In *W. J. Dillner Transfer Co.* v. *United States*, 101 F. Supp. 506, 509 (W. D. Pa.), which also involved an order of the Interstate Commerce Commission under Section 207 (a), a three-judge district court held that failure to object to

the examiner's qualifications during the proceedings before the Commission "bars review of such objections when raised for the first time in a judicial proceeding of this type."[17] Also, the Court of Appeals for the District of Columbia Circuit, in *Democratic Printing Co.* v. *Federal Communications Commission*, decided June 12, 1952, held that the legislative history of the Act "clearly indicates" that compliance with the hearing-officer requirements of the Act may be waived. The Court of Appeals concluded that failure to object to the administrative agency, in the face of knowledge that these requirements were not being applied, was "waiver by non-action" which barred pressing the objection in a suit to upset the administrative order. However, in *Pinkett et al.* v. *United States*, 105 F. Supp. 67 (D. Md.), a three-judge district court reached the same result as the court below in the instant case.

Moreover, this Court has recently held that the alleged disqualification of an administrative hearing officer is not jurisdictional in the sense that it invalidates administrative action even in the absence of timely objection. In *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 583-584, foonote 4, this Court said:

> * * * Harisiades also contends that, the Administrative Procedure Act aside, he was denied procedural due process in that in his 1946-47 hearings the same individual acted

[17] Appeal from the decision is now pending, No. 77, this Term.

both as presiding officer and examining officer. However, it appears that the officer here performed both functions with Harisiades' consent. He, therefore, has no standing to raise the objection now.

It is significant that Section 7(a) of the Administrative Procedure Act provides that "upon the filing in good faith of a *timely* and sufficient affidavit of personal bias or disqualification of any such [hearing] officer, the agency shall determine the matter as a part of the record and decision in the case" (emphasis supplied). While it may be that "disqualification" was not intended to refer specifically to non-appointment pursuant to Section 11, the quoted provision clearly reflects a general policy that objections to the qualifications of hearing officers shall be made promptly, rather than belatedly after gambling on a favorable decision.[18]

The fact that prior to the administrative proceedings in this case the Commission had taken the position that proceedings under Section 207(a) of Part

[18] Perhaps Section 7(a)'s requirement of timely objection is limited to situations where the chances of actual prejudice to the parties are slight. Thus, the reports of the Senate and House Committees on the Judiciary state that, "If it [bias or disqualification] appeared or were discovered late, it would have the effect—where issues of fact or discretion were important and the conduct and demeanor of witnesses relevant in determining them—of rendering the recommended decisions or initial decisions of such officers invalid." Administrative Procedure Act, Legislative History, Senate Doc. 248, 79th Cong., 2d Sess., pp. 207, 269. However, the conduct and demeanor of witnesses is not a significant factor in cases under Section 207(a) and, as pointed out, *infra*, the Administrative Procedure Act does not require the hearing officer in such cases to prepare the intermediate decision.

II of the Interstate Commerce Act were not governed by the Administrative Procedure Act, does not excuse the appellee's failure to raise the issue before the Commission. Where prior resort to an administrative agency is a prerequisite to judicial consideraiton of certain issues, the possibility or probability that the administrative agency will maintain a position which it has taken in earlier cases will not justify a failure to raise such issues before the agency. *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 487-488; *Gilchrist* v. *Interborough Co.*, 279 U. S. 159, 207-208. In the *U. S. Navigation Co.* case, this Court insisted upon resort to the primary jurisdiction of the United States Shipping Board against a claim that in another case the Board had already resolved the same issue in favor of the claimant. In the *Gilchrist* case, the plaintiff had applied to a New York administrative agency for a rate increase and thereafter had commenced a suit in the District Court seeking to enjoin the maintenance of the existing five cent fare. On the day the suit was begun, the Transit Commission held that it lacked power to change the rate. Although the Commission had "long held the view that it lacks power to change the five cent rate established by contract" (279 U.S. at 211), this Court held that "the Interborough Company could not have resorted to a federal court without first applying to the Commission as prescribed by the statute. And having made such an application it could not defeat orderly action by alieging an intent to deny the relief sought."

(279 U.S. at 208-209.)[19] The decision in *Gilchrist* should control the instant case.

Moreover, in the instant case it is by no means clear that it would have been futile to challenge the qualifications of the hearing officer during the proceedings before the Commission. While the Commission had already taken the position that such hearings were not required to be conducted before an examiner appointed pursuant to Section 11 of the Administrative Procedure Act, the Commission might have assigned such an examiner to this case if a timely demand had been made, particularly if the other parties to the proceeding had joined in such request. More important, if a substantial number of parties to similar proceedings under Section 207(a) had made early objections to the conduct of such proceedings by examiners not appointed under Section 11, the Commission might well have reconsidered its position, or decided to eliminate the issue by assigning Section 11 examiners to hear cases in which the issue was raised.

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[19] A case which is cited as opposed to *Gilchrist* is *City Bank Co. v. Schnader*, 291 U.S. 24. See Davis, *Administrative Law* (1951) p. 627. However, the result in the *City Bank Co.* case may reflect the fact that exhaustion of the state remedies would have deprived the plaintiff of access to the Federal courts. For a criticism of the case, see Berger, *Exhaustion of Administrative Remedies*, 48 Yale L. J. 981, 991.

C. *Where, as here, the alleged procedural defect did not injure appellee and reheqring would prejudice other parties, there should be no departure from the rule that objections not presented to the administrative agency will not be considered by the courts*

Appellee has never even alleged that it was actually prejudiced by the fact that the Cunningham application had been heard before an examiner not appointed in accordance with Section 11, and in proceedings under Section 207(a) it is doubtful whether such prejudice would ever exist (see *supra,* pp. 27-28). Furthermore, the major requirements of the Administrative Procedure Act relating to the functions of hearing officers are not applicable to this type of proceeding.

The Act undertakes to enhance the independence and responsible role of hearing officers in three ways. By Section 5(c) it isolates hearing officers in cases of adjudication from control or influence by agency employees engaged in investigating or prosecuting functions. By Sections 5(c) and 8(a) it requires that the officer who received the evidence make the initial or recommended decision. By Section 11 it places control of their compensation and tenure in the Civil Service Commission. The determination of applications for "initial licenses" is, however, expressly excluded from the requirements of Sections 5(c) and 8(a), and the application before the Interstate Commerce Com-

mission in the present case came within this exception. Thus, the last sentence of Section 5(c) wholly exempts from the separation of functions requirements of that subsection the determination of applications for "initial licenses." Also, Section 8(a) specifically provides that "in * * * determining applications for initial licenses" the administrative agency may substitute for a report prepared by the examiner who conducted the hearing either a tentative decision by the agency itself or a recommended decision prepared by "any of its responsible officers".

An application for a certificate of public convenience and necessity under Section 207(a) of the Interstate Commerce Act is an application for a "license" within the meaning of the Administrative Procedure Act.[20] Such an application is for an "initial" license whether the applicant presently has no certificate of convenience and necessity or, as here, seeks modification and extension of certificates already held.[21] It follows that hearings on applications under Section 207(a)

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[20] Section 2(e) of the Act defines "license" as including "certificate".

[21] The application by Cunningham sought authority to furnish regular, in place of irregular, motor carrier service, and to serve additional points. The reasons for concluding that an application for modification or extension of an existing license, as distinguished from an application for renewal of a license or an uninvited modification of a license, should be treated as an application for an "initial license," are set forth in detail in *The Attorney General's Manual on the Administrative Procedure Act* (1947) pp. 50-53; Davis, *Administrative Law* (1951) p. 432; Ginnane *"Rule Making", "Adjudication" and Exemptions Under the Administrative Procedure Act*, 95 U. of Pa. L.R. 621, 639-641.

are not subject to the separation of functions requirements of the Administrative Procedure Act and that the recommended decision need not be made by the officer who conducted the hearing. In these applications, therefore, the only hearing officer requirement of the Act is that the officer presiding at the taking of evidence should have been appointed pursuant to Section 11.

The requirement of appointment of examiners in accordance with Section 11, while its importance is not to be minimized, subserves the long-range objectives of the Act rather than the immediate interests of the parties to administrative proceedings. In circumstances such as those of the instant case, where the hearing for the taking of evidence and all subsequent administrative steps had been concluded without suggestion of any prejudicial procedural taint, we submit that the basic objective of the Administrative Procedure Act would be defeated rather than promoted by a holding that an intervenor in the administrative proceeding may later come into court and obtain a judgment declaring the prior administrative action null and void. Section 10(e) of the Administrative Procedure Act expressly provides that in the judicial review of administrative action "due account shall be taken of the rule of prejudicial error".

If it should be held that the Interstate Commerce Commission's failure to use Section 11 examiners invalidates its action in these Section 207(a) cases, and in similar contract carrier permit cases under Section 209, at the suit of

parties who made no timely objection during the administrative proceedings, there will be opened to challenge the Commission's orders in about 5,000 cases commenced after June 11, 1947, and completed before this Court's decision in the *Riss* case. In these cases, the Commission granted approximately 2,500 common carrier certificates of public convenience and necessity and contract carrier permits.[22] The instant decision casts doubt upon the validity of all of these certificates and permits. Although the court below referred to the Commission's action in this case as "void" (R. 90), we assume that the validity of such certificates and permits is not open to collateral attack. However, even on that assumption, since there is no statute of limitations in proceedings to set aside Interstate Commerce Commission orders, unsuccessful protestants may, for a presumably indefinite period, subject only to the doctrine of laches, judicially challenge their competitors' operating authority. Ten more court cases raising the examiner issue already have been filed. In addition, since the decisions in the *Riss* case and the instant case, about 50 petitions for reconsideration have been filed with the Commission seeking rehearing before an examiner appointed pursuant to the Administrative Procedure Act. Moreover, there were many unsuccessful applicants for certificates or permits during this period who would

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[22] Sixty-fifth Annual Report of the Interstate Commerce Commission (November 1, 1951) p. 52.

be entitled to reopen their cases under the instant decision.

While no one can predict the number of Section 207(a) cases in which rehearing would be required if the decision below should be affirmed, there can be no doubt that the number would be substantial. In addition to the cost and burden to the Commission, motor carriers which have been awarded certificates or permits in these cases, and which have made investments and inaugurated or extended motor carrier service in reliance upon such authorizations, would be put to the expense and inconvenience of again justifying the issuance of certificates to them. This simply emphasizes that these contested motor carrier cases usually involve a clash between competing motor carriers, and not a dispute between government and individuals. In the cases where certificates have been issued, these belated objections by protesting competitors to the qualifications of hearing officers involve the same considerations which invoke application of the equitable doctrine of laches. *United States ex rel. Arant* v. *Lane;* 249 U. S. 367.

In the cases in which the Commission denied applications for certificates in whole or in part, the decision below is unnecessary to protect the interests of such applicants. If rehearing is required, the applicant's presentation would not be limited to the facts and circumstances existing on the date of his original application. If they have substantially changed, the applicant can apply for a reopening of the earlier hearing. If they have not

changed, it would be a rare case in which a hearing before a different hearing officer would produce a different result.

In determining whether, in the situation here presented, there should be adherence to the rule that in reviewing administrative action courts will not consider objections which were not presented to the administrative agency, it may be appropriate to balance the equities and interests of the various parties affected. See *Hormel* v. *Helvering*, 312 U. S. 552, 556-557. We submit that any balancing of the equities in this and similar cases under Section 207(a) calls for adherence to the general rule. The absence of any showing or likelihood of actual prejudice to those who belatedly object to the hearing officers' qualifications, the injury to other parties who have acted in reliance upon the lack of timely objections, and the cost to the Commission and to affected motor carriers of futile rehearings, compel the conclusion that parties to proceedings under Section 207(a) who failed to challenge the qualifications of the hearing officers during the administrative proceedings, should not be allowed to do so for the first time in the courts.

As a matter of fact, following this Court's decision in the *Riss* case, a large number of the Commission's motor carrier examiners, including examiner Kephart who heard this application, were appointed hearing examiners under Section 11. While it would not be true in this case, as Examiner Kephart has retired, undoubtedly the rehearings required in a large number of cases if the decision of

the lower court is affirmed might well be before the same examiners who heard the cases originally, as familiarity with the issues and the record would be an important factor in assigning the cases for rehearing.

In those cases in which the objection was made during the hearing before the examiner the Commission will order a rehearing upon the application of any party to the original hearing. Where the objection was not raised until after the hearing before the examiner, as by exceptions to his recommended report or petitions for reconsideration by the Commission, the Commission, in accordance with its established practice of not considering issues which were not raised before its examiner, proposes to deny rehearings. Sixty-fifth Annual Report of the Interstate Commerce Commission, pp. 52-53.

CONCLUSION

For the above reasons, it is respectfully submitted that the decision of the court below should be reversed.

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Acting Solicitor General.

NEWELL A. CLAPP,
Acting Assistant Attorney General.

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EDWARD M. REIDY,
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Interstate Commerce Commission.

SEPTEMBER, 1952.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952 223139 383

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 621

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellants,

vs.

L. A. TUCKER TRUCK LINES, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

MOTION TO AFFIRM

B. W. La Tourette,
G. M. Rebman,
Counsel for Appellee.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil No. 7490(3)

L. A. TUCKER TRUCK LINES, INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants

MOTION TO AFFIRM

Appellee, L. A. Tucker Truck Lines, Inc., pursuant to Rule 12, Paragraph 3, of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court herein be affirmed.

This is a direct appeal from the final judgment and decree entered on December 7, 1951 (The Court's Opinion rendered by Judges Woodrough, Hulen and Harper, was entered on October 18, 1951, and reported in 100 Fed. Supp. 432), by a specially constituted District Court of three Judges convened pursuant to Section 2284, Title 28 of the United States Code, sustaining Appellee's complaint, setting aside an order of the Interstate Commerce Commission and remanding said cause to the Interstate Commerce Commission for such action as it may deem appropriate, and in accordance with the Opinion of the Court.

The Commission's order of January 13, 1950, and the Certificate issued pursuant to such order on August 7, 1950, authorized C. L. Cunningham, d/b/a Pemiscot Motor Freight Company, to conduct operations as a common carrier by motor vehicle over regular routes and between points and places as more particularly set out in said Certificate of Public Convenience and Necessity No. MC 105120, after having found that the present and future public convenience and necessity require such operations by said C. L. Cunningham, d/b/a Pemiscot Motor Freight Company, and that said C. L. Cunningham was fit, willing and able to conduct such operations.

Appellee herein intervened in opposition in said proceedings before the Interstate Commerce Commission to protect its interests insofar as they would be affected by the granting of said application.

After having exhausted its remedies before the Interstate Commerce Commission, Appellee brought the instant action in the Federal District Court for the Eastern Division of the Eastern District of Missouri, challenging said order of the Interstate Commerce Commission as having been unjust, arbitrary, unreasonable and without basis in fact and law. Subsequent to the filing of its petition herein and after April 16, 1951, to-wit: on or about May 20, 1951, Appellee herein learned that the Examiner to whom the case was assigned for hearing by the Interstate Commerce Commission was not at that time, to-wit: On January 27, 1949, a hearing examiner qualified pursuant to the requirements of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001, *et seq.* Upon learning of the lack of qualifications of the Examiner, Appellee, by leave of Court, filed its motion to amend its complaint, together with the amendment thereto, alleging as additional grounds of complaint and invalidity, that the order of the Interstate Commerce Commis-

sion was null and void by reason of the fact that the person to w' om said proceedings were assigned for hearing and by whom same was heard, was not a hearing examiner duly qualified in accordance with the provisions of the Administrative Procedure Act, *supra.*

The District Court, in its Opinion and final judgment and decree, found that the order of the Interstate Commerce Commission was null and void because the Interstate Commerce Commission did not have jurisdiction, in that the proceedings under review had not been heard by a properly qualified person in accordance with the requirements of the Administrative Procedure Act, *supra.*

This appeal presents only the narrow question, whether orders of the Interstate Commerce Commission entered on a record made before one not a qualified hearing examiner under the provisions of the Administrative Procedure Act are void or merely voidable.

In essence, the above question presents the primary issue upon which Appellants rely in the instant case, namely, that failure of Appellee to have raised this objection before the hearing or at least before the Interstate Commerce Commission precludes Appellee from raising the question for the first time on an appeal in Court, as well as the subsidiary issue of whether the requirements of the Administrative Procedure Act are substantial or procedural—if substantive, we submit, Appellee cannot be held to have waived the question; if procedural, the judgment of the District Court must be reversed and the cause remanded.

No useful purpose would be served by reciting the history of events which led to the enactment of the Administrative Procedure Act, 5 U. S. C. Sections 1001 *et seq.*, as such history is briefly and concisely discussed in the case of *Wong Yang Sung* v. *McGrath*, 339 U. S. 33. Suffice it to say, that after having reviewed such history, the legislative history

and the Administrative Procedure Act, this Honorable Court concluded at Page 53 in that case:

> "We hold that deportation proceedings *must* conform to the Administrative Procedure Act if resulting orders are to have validity." (Italics Supplied.)

Perhaps, in the instant case the niceties of language were not studiously observed when the District Court, at our suggestion, found the Order of the Interstate Commerce Commission void for lack of jurisdiction, because of non-conformity to the requirements of the Administrative Procedure Act. Possibly the word "jurisdiction" or the phrase "lack of jurisdiction" should not have been used, or was used too loosely. However that may be, it is the substance of the decision of the District Court which must be affirmed, irrespective of the language in which it is expressed. Obviously, the District Court, again following our suggestion, read into this Court's decision in *Wong Yang Sung* v. *McGrath, supra,* the thought that non-conformity to the requirements of the Administrative Procedure Act in effect ousted the Agency of Jurisdiction, premised on the reasoning that while the proceedings were of a nature over which the Immigration Service had jurisdiction, nevertheless, the assigning of such proceedings to one not qualified under the Administrative Procedure Act, *supra,* was an assignment to one not personally invested with "jurisdiction" to hear and try such cases—that, therefore, there having been a lack of qualification of and jurisdiction in the hearing officer, jurisdiction could not subsequently be regained without beginning *de novo.* This by reason of the fact that the proceeding was one, such as must be heard in accordance with the Administrative Procedure Act to satisfy the requirements of "due process." "Due process" could not be supplied without conforming to the requirements of the Administrative Procedure Act.

Irrespective, however, of the propriety of the choice of such word as "jurisdiction", one fact becomes apparent from a reading of the *Wong Yang Sung* v. *McGrath* case, *supra*, and that is that an order entered following proceedings not in conformity to the requirements of the Administrative Procedure Act is *not valid*. This Court did not say, "voidable"; its language was unequivocal.

Insofar as the facts of the instant case are concerned, they are squarely identical to the facts in the *Wong Yang Sung* v. *McGrath* case, *supra*, that is, in the *Wong Yang Sung* case, the petitioner made no objection during the conduct of the agency proceedings with respect to the qualifications of the Immigration Inspector who initially heard the case. The matter proceeded through the regular channels of the Immigration Department in the same manner as the application of C. L. Cunningham was processed before the Interstate Commerce Commission. Wong Yang Sung raised the question of the qualifications of the hearing examiner for the first time in the District Court. Again, in the instant case, L. A. Tucker Truck Lines, Inc., admittedly raised the question in Court for the first time.

Further, we submit, that the decision of the Court in the *Wong Yang Sung* case, *supra*, is conclusive of the position of the Appellant under their Assignment of Error No. 1, and under their Argument as set out in their Jurisdictional Statement filed in connection with their appeal herein. However, counsel for Appellants in their Jurisdictional Statement state that the issue respecting the qualifications of the Examiner presented as it is in the instant case, was not presented to nor decided by this Court in *Riss & Co.* v. *U. S.*, 341 U. S. 907.

We admit that this issue was not present in the *Riss & Co.* case. However, it is our studied opinion, and in this we feel that the Appellants agree as did the District Court in the instant case, as well as the District Court in the case of

W. J. Dillner Transfer Co. v. *U. S., et al.*, for the Western District of Pennsylvania, that this Honorable Court determined that proceedings under Section 207 of Part II of the Interstate Commerce Act are proceedings of such nature as require a hearing, all as provided for in Section 5 of the Administrative Procedure Act, *supra*.

In other words, we construe the decision of this Court in the *Riss* case, as holding that Section 207 of Part II of the Interstate Commerce Act must be held with the same dignity and in conformity with the provisions of the Administrative Procedure Act, the same as proceedings under the Immigration Act.

Further, it has long been settled that, "administrative orders quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence'." *Interstate Commerce Commission* v. *L. & N. Railroad Co.*, 227 U. S. 88, l. c. 91.

The same principle was reiterated by Chief Justice Hughes in the case of *Morgan* v. *United States*, 304 U. S. 1, l. c. 14 and 15, wherein it was said:

> "The first question goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature. The vast expansion of this field of administrative regulation in response to pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character, the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing',—essential alike to the legal validity of the administrative regulation and other maintenance of public confidence

in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard'. St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 73; Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 304, 305; Railroad Commission of California v. Pacific Gas & Electric Co., 302 U. S. 388, 393; Morgan v. United States, supra."

Thus, the principle appears to have long been established that whether the underlying statute requires that a hearing be held, or not, "due process" requires that such hearing be accorded to all parties if the order is quasi-judicial in character; such judicial interpretation is necessary to render the statute valid. *Wong Yang Sung* v. *McGrath, supra.*

Since this has been concluded, we again submit that argument of the issue now prosented would merely constitute a reargument of the same issues presented in the case of *Wong Yang Sung* v. *McGrath, supra.*

It is interesting to note that nowhere in the Jurisdictional Statement filed on behalf of Appellants is any reference made to the *Wong Yang Sung* case. Relative to the cases cited in support of the proposition that the Courts will not consider objections not presented to the Commission, the matters decided in said cases did not relate to issues which are basic, jurisdictional and which go to the inherent validity or invalidity of the order under attack because of lack of due process.

At Page 10 of the Jurisdictional Statement of Appellants herein, Appellants state that, "if the Commission had been informed through timely objections that a large number of the parties to proceedings under Section 207 were contending that the Administrative Procedure Act was applicable, it might well have followed a different course of action, such as complying with that Act out of abundance of caution, or asking Congress for clarifying legislation."

Appellant will urge, as it did in the Court below, that Appellee has not exhausted its administrative remedies. Such suggestion begs the question, as it cannot be contended by Appellants that they were unaware of the lack of qualification of the Examiner to whom the case was assigned. Certainly, the Commission was in the better position to know such fact. Its assignment of the case to one not a qualified hearing examiner indicates the position which the Commission had taken with respect to the necessity for assigning such matter to a qualified hearing examiner. Such act of assignment constituted a decision or order by the Commission on that issue. Exhaustion of administrative remedy, even had it been shown that Appellee had knowledge of the lack of such qualification, would have been of no avail, for had the Commission been minded to observe the requirements of law, it would have done so, whether Appellee had exhausted its remedy or not. Certainly, it cannot now be contended that had Appellee exhausted its remedy before the Commission, the proceedings would have been reopened for hearing in accordance with law. We cannot understand that citizens in dealing with their Government must consider that their Government will not observe the law, unless the citizen complains. Further, the previous attitude of the Commission in this regard had been crystallized, as witness its refusal to comply with the Administrative Procedure Act after persistent efforts of Riss & Co. in its case, which we submit establishes the law of the instant case. Further, it is submitted that the instant issue is purely one of law not requiring new or amplified factual determinations, and consequently may be presented for the first time on judicial review. *Block Motor Co.* v. *Comm'r of Internal Revenue*, 125 F. 2d 977.

Again at Page 12 of the Jurisdictional Statement filed herein, Appellants beg the question by attempting to point out the effect of this decision upon the action of the Inter-

state Commerce Commission taken on Section 207 applications between the effective date of the Administrative Procedure Act and the Supreme Court decision in the *Riss & Co.* case. Such argument merely attempts to point up the inexpediency of reversing the lower court in the instant case, which reversal, we submit, would constitute a reversal of the *Wong Yang Sung* v. *McGrath* case and the *Riss & Co.* v. *U. S.* case.

We submit that when considerations of due process are involved, expediency cannot control the decision of the Court, inasmuch as fundamental Constitutional rights are involved.

Further, the Commission was aware of the passage of the Administrative Procedure Act and simply because it, as an arm of the Federal Government, did not, for reasons known only to itself, see fit to comply with that law, it cannot now seek to avoid the effect of its own non-compliance.

The question of the assignment of qualified examiners to proceedings under Section 207 was raised in numerous cases before the Interstate Commerce Commission prior to the *Riss & Co.* v. *U. S.* decision, in each and every one of which the Commission took the position that the Administrative Procedure Act was not applicable to such proceedings. The position of the Commission in this respect was adequately demonstrated in the *Riss & Co.* v. *U. S.* case, so that timely objections would have availed this Appellee nothing, nor any other party to any of the other 2,500 or so proceedings referred to in the Jurisdictional Statement.

Further, we submit, that a party to a proceeding before the Interstate Commerce Commission or any other agency of Government, has a right to assume that such agency or commission will comply with the law. As the Honorable Ruby M. Hulen, one of the Judges comprising the special Statutory Court in the instant case, pointed out, "I think it is a presumption of law that the Commission will obey

the law and follow the law." We submit that the Commission, nor any other Agency of our Government, should not be permitted to gain advantage over its citizens through willfull non-conformance to the law. As Judge Hulen further pointed out that if the position of the Appellants is sustained, "if the Commission can put it over without the man (Appellee) learning about it, that is all right?" We submit that for the Court to tolerate such abuse and disregard of law is immoral and contrary to the letter and spirit of Constitutional guarantees.

To state the proposition directly and unequivocally, we find that position of the Appellants to be substantially as indicated by Judge Hulen above, namely, that a citizen of these United States has no right to assume that its Government, or any branch thereof, will act in accordance with the law and consequently, in every proceeding in which that citizen participates wherein his Government is involved, he must question the legality of his Government's actions. Such, we submit, is not the true spirit or letter of the law of these United States; nor does the true spirit or letter of the law of these United States permit a violation of law and ignoring of law by any branch of the Government without court sanction for such violation, either of omission or commission. Expediency cannot, we submit, determine the application of the law. Should such be the rule, it is submitted, that Constitutional guarantees, whether of due process or of any other right, would no longer be guarantees, but would merely be licenses granted at the will of the Government to be revoked when the Government will no longer tolerate the existence of such licenses.

From the above, it is apparent that this appeal presents no new, novel or substantial question.

Accordingly, it is respectfully submitted that the judgment and decree of the District Court in the instant case be

ruled as having been determined by the case of *Riss & Co.* v. *U. S., supra,* and *Wong Yang Sung* v. *McGrath,* and be affirmed.

Respectfully submitted,

B. W. La Tourette,
G. M. Rebman,
Attorneys for L. A. Tucker Truck Lines, Inc.

No. 18.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

L. A. TUCKER TRUCK LINES, INC.,
Appellee.

On Appeal from the United States District Court for the Eastern District of Missouri.

BRIEF

Of L. A. Tucker Truck Lines, Inc., Appellee.

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IN THE

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THE UNITED STATES OF AMERICA and
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v.

L. A. TUCKER TRUCK LINES, INC.,
Appellee.

On Appeal from the United States District Court for the Eastern District of Missouri.

BRIEF

Of L. A. Tucker Truck Lines, Inc., Appellee.

OPINION BELOW.

The opinion of the District Court in L. A. Tucker Truck Lines, Inc., is reported in 100 F. Supp. 432 (R. 88).

JURISDICTION.

The appellee concedes the jurisdiction of this Court as set out at pages 1 and 2 of appellants' brief.

QUESTION PRESENTED.

The sole question presented reduced to its simplest form is: Are orders issued by an Administrative Agency following a hearing required by law but had before one not a hearing officer appointed in accordance with Section 11 of the Administrative Procedure Act valid?

STATUTES INVOLVED.

Section 207 (a) of Part II[1] of the Interstate Commerce Act, 49 Stat. 543, 551, 49 U. S. C. 307 (a), provides in part as follows:

> Subject to Section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied * * *.

The Administrative Procedure Act of June 11, 1946, 60 Stat. 237, 5 U. S. C. 1001 et seq., provides in part as follows:

> Sec. 5. In every case required by statute to be determined on the record after opportunity for an agency hearing * * *.
>
> Sec. 7. In hearings which Section 4 or 5 requires to be conducted pursuant to this section—
>
> (a) **Presiding Officers.**—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; * * *.
>
> Sec. 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there

[1] Part II of the Act applies to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce. Section 202 (a) of Interstate Commerce Act, 49 U. S. C. 302 (a).

shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. * * *

STATEMENT.

Excepting for the comments of appellants concerning the opinion of the District Court and its alleged refusal to give effect to certain rules, all as set out on page 9 of appellants' brief, appellee adopts the statement of appellants as fairly representing the history of the proceedings in the instant case both before the Interstate Commerce Commission and the District Court below.

SUMMARY OF ARGUMENT.

It is the contention of the appellee that the decision and order of the Court below in the instant case gave effect to the mandate of Congress as set out in the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001 et seq., as well as to the construction placed upon that Act by this Court in the cases of **Wong Yang Sung v. McGrath**, 339 U. S. 33, and **Riss & Co. v. United States**, 341 U. S. 907.

Appellants admit that in **Riss & Co. v. United States**, supra, this Court held that hearing officers who conduct administrative hearings on applications for motor carrier certificates of public convenience and necessity under Section 207 (a) of the Interstate Commerce Act must be appointed in accordance with Section 11 of the Administrative Procedure Act. What appellants apparently do not admit is that the decision of this Court in **Wong Yang Sung v. McGrath**, supra, ruled the case of **Riss & Co. v. United States**, supra, and also rules this case.

It is the contention of appellee that no jurisdiction to issue a valid order attaches to the Commission if a hearing held under Section 207 (a) of the Interstate Commerce Act was not held before a qualified hearing examiner. We submit that our position is sustained by the above referred to cases and that the decision of the District Court must be sustained.

We cannot agree with the various contentions of appellants that failure to have raised the objection respecting non-qualification of the hearing examiner before the Commission leaves us without a remedy.

Nor can we agree that the rule of Primary Jurisdiction is applicable to questions concerning which Congress has given the Commission no discretion or concerning which the Commission's expertise is not involved.

We cannot agree that appellee was guilty of laches or should have known that the Commission would act in violation of the law.

Nor can we agree that because the Commission has violated the law, this Court should now excuse such violation, even though appellee has been prejudiced, simply because appellee rightly presumed that the Commission would abide by the law and not violate it.

We do not recognize any exception in the Administrative Procedure Act which establishes a different standard with respect to the qualification of hearing examiners in cases involving applications for "initial licenses."

In conclusion, we submit that the Wong Yang Sung and the Riss & Co. cases, supra, must rule this case and we further submit that any other ruling would result in a reversal of said cases and in the ignoring of Congressional approval of this Court's interpretation of the Administrative Procedure Act.

ARGUMENT.

THE FINDINGS OF THE DISTRICT COURT WERE CONSONANT WITH THE LAW.

Appellants, on Brief, contend that the exact situation presented by the case presently before this Court was not present in the case of **Riss & Co. v. United States**, 341 U. S. 907. The difference to which appellants point is that in the instant case no objection was made to the qualification of the hearing officer at any time before the Commission. From this distinction, several arguments are drawn by the appellants in an attempt to justify the Commission's action and to secure reversal of the lower court. These arguments briefly address themselves: (1) to the question of waiver, and (2) to the "primary jurisdiction" rule. Of these two contentions of the appellants, we shall treat later.

What the appellants, however, overlook, whether through convenience or inadvertence, is that the case now before this Court is identical with that of Wong Yang Sung v. McGrath, 339 U. S. 33, l. c. 53, where this Court held:

> "We hold that deportation proceedings must conform to the requirements of the Administrative Act if resulting orders are to have validity."

This pronouncement was made by this Court in the face of the fact that petitioner in the Wong Yang Sung case had not at any time raised the question of qualification of the hearing officer until he filed his petition for habeas corpus in the District Court. It is to be noted specifically that the language of the Court does not leave any room for doubt that failure of the Administrative Agency to have conformed to the requirements of the Administrative Procedure Act renders the entire proceedings and all resulting orders invalid.

As if to persuade the Court by arguments of expediency, appellants have sought to divert this Court's attention

from the issues at hand and to inject into the case extraneous issues such as the question of validity of hundreds of orders issued by the Interstate Commerce Commission under Section 207 (a) prior to the Riss decision, in which proceedings none of the parties are alleged to have objected to the qualifications of any of the Commission's officers. Of course, excepting for unverified statements of counsel, there is no evidence before the Court, nor was there any before the Court below, concerning these matters.

We submit that any argument of convenience cannot be persuasive of the constitutional issue of due process as it may be applied in a given case.

A.

Whether the Appellee Had Opportunity During the Proceedings Before the Commission to Object to the Hearing Officer's Qualifications or Not Cannot Be Determinative of the Issues Involved Herein.

Appellants in their brief contend that the appellee was charged with knowledge during the pendency of the Commission's proceedings that the Commission interpreted the hearing officer's requirements of the Administrative Procedure Act as not applying to applications for Certificates of Convenience and Necessity under Section 207 (a) of the Interstate Commerce Act. This indeed puts an entirely new light upon the duty of a citizen of this country. We subscribe to the principle that citizens are charged with the knowledge of the law, but we cannot subscribe to the contention that a citizen is charged with knowledge that his Government, or any branch of his Government, will violate the law or is in violation of the law.

As the Honorable Rubey M. Hulen, one of the three Judges presiding in the court below, observed, at page 17 of the Transcript of Proceedings before the District Court

in the instant case, "I think there is a presumption of law that the Commission will obey the law and follow the law."

To suggest that the appellee should be estopped or that it has waived its rights by non-recognition of the Commission's law violation certainly begs the question before the Court and places upon the appellee and others involved in proceedings before the Commission an unconscionable and unheard of burden. Such argument and such contention is alien to our form of government and should not be heard by this Court.

In attempted justification of its position, the Commission indicates that it took the view that Sections 5, 7, 8 and 11 of the Administrative Procedure Act were applicable only where Congress has otherwise specifically required a hearing to be held. This Court in the Wong Yang Sung case, supra, reiterated a principle long established in the law with respect to the necessity for hearings and applied it to the language of Section 5 of the Administrative Procedure Act in the following quotation:

> "We do not think the limited words ('hearings required by statute') renders the Administrative Procedure Act inapplicable to hearings, the requirement of which has been read into a statute by the Court in order to save the statute from invalidity."

An early case involving this very same Commission which indicated the necessity for a hearing in all instances where the administrative function is quasi-judicial in character was that of **Interstate Commerce Commission v. L. & N. Railroad Co.**, 227 U. S. 88, l. c. 91, where this Court said:

> "Administrative orders quasi-judicial in character are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the indisputable character of the evidence."

Again, in the case of **Morgan v. United States**, 304 U. S. 1, l. c. 14 and 15, Chief Justice Hughes reiterated the same principle and cited a number of cases, all of which held that administrative proceedings of the type herein questioned, "demand a fair and open hearing, essential alike to the legal validity of the administrative regulation and other maintenance of public confidence in the value and soundness of this important Governmental process, such a hearing has been described as an 'inexorable safeguard.'"

The Commission in the face of such determination by this high court cannot, in the instant case, hide behind the erroneous and unwarranted construction placed upon the Administrative Procedure Act, after the Congress had legislated on the subject matter.

Certainly, the Commission can take no position other or different from that which the citizen can take, namely, that reliance upon private interpretation of the law does not excuse the resultant violation. Further, the history of proceedings before the Congress prior to the adoption of the Administrative Procedure Act indicates all Administrative Agencies of the Federal Government were requested to submit their views of the proposed legislation and to participate in advising and assisting the Legislative Branch of our Government in the adoption of the Administrative Procedure Act.

This Court recognized such history in observing in the Wong Yang Sung case, l. c. 40, that

"the McCarran-Sumners Bill, which evolved into the present Act, was introduced in 1945. Its consideration and hearing, especially of agency interests, was painstaking. All administrative agencies were invited to submit their views in writing. A tentative revised bill was then prepared and interested parties were again invited to submit criticism. The Attorney Gen-

eral named representatives of the Department of Justice to canvass the agencies and report their criticism, and submitted a favorable report on the Bill as finally revised."

Thus, should there have been any doubt in the Commission's mind of the applicability of the Administrative Procedure Act, the Commission had ample opportunity to secure Congressional definition of any questions it may have had relative to the requirements of the Administrative Procedure Act, or on the other hand, it could have requested exemption from all or a part of the provisions of said Bill.

The history of the Riss & Co. case, as distinguished from the decision of this Court in that case, is not at all persuasive of the issues involved herein, nor can the decisions of the lower court therein be considered either as having justified the Commission's position, nor as having put this appellee on notice that the examiner assigned to the Cunningham case was not a hearing officer qualified in accordance with the requirements of the Administrative Procedure Act.

Again, as the Honorable Rubey M. Hulen so aptly observed at page 17 of the Transcript of Proceedings in the District Court, that, "If the Commission can put it over without the man learning about it, that is all right?"

The entire burden of appellants' argument points to an affirmative answer to the above question. We submit there is no basis in law to support the appellants' contention.

B.

The Primary Jurisdiction Rule Is of No Pertinence to the Instant Proceedings.

Under Paragraph B of their argument, appellants attempt to invoke the Primary Jurisdiction Rule in support of their position and cite numerous cases in support thereof,

many of which have announced and reiterated the general rule relative to the exhaustion of administrative or legal remedies.

While we do not propose to quarrel with or find any fault in the Primary Jurisdiction Rule, or as otherwise stated, the rule which requires the exhaustion of administrative remedies, we submit that the matters of which this appellee complained in the court below relative to the lack of qualification of the hearing examiner and the resulting defect and invalidity of the Commission's order do not invoke the principle announced in the Primary Jurisdiction Rule or that pronounced in the cases which sustained the proposition that administrative remedies must be exhausted before recourse is had to the courts.

The above two rules which are substantially identical, have reiterated and emanated from the long standing rule that matters may not be urged on appeal which were not urged in the court below. However, where the court below, for some reason or other, did not acquire jurisdiction, either because the litigation then before it was of such character that the court did not possess the jurisdiction or because the one before whom the trial was had was not qualified as a Judge in accordance with the law, such question is never waived and may be raised at any time in the course of the proceedings or on appeal for the first time.

We say that the Primary Jurisdiction Rule is not pertinent because the cloak which the courts have thrown around the findings of administrative agencies so as to require one to exhaust all remedies before the agency before pursuing an appeal in a court of law has related only to matters or questions over which that agency has jurisdiction. In other words, the courts have constantly maintained and held that the Congress having charged, for example the Interstate Commerce Commission, with the

duty of determining whether from the facts public convenience and necessity requires the institution of another carrier service, the courts should not substitute their judgment for that of the Commission nor should the court interfere with the Commission's orderly process in adjudicating such an issue because the courts have recognized that such adjudications by the Commission involve the exercise of an expert judgment entrusted by Congress to the Commission. However, the question of whether the hearing examiner was duly qualified in accordance with the mandate of Congress was expressed in the Administrative Procedure Act, and the further question of whether or not proceedings under Section 207 (a) are such as to require a hearing, are not matters which call for the expertise of the Interstate Commerce Commission; these are matters which have been settled and determined by the Courts and by Congress. These are matters which have been enjoined upon the Commission and for the failure of observance of which the Commission may not and cannot be heard to complain when their invalid action has been attacked. The Congress has not given to the Commission the right to adjudicate such matters as above referred to. The Congress has set a minimum standard of conduct to be observed by the Commission in proceedings of that sort and has left nothing to the discretion or judgment of the Commission.

To compare the denial of due process with the reception of inadmissible evidence received without objection; to compare the denial of due process with the waiver of the privilege against self incrimination; with the rule relevant to the introduction of newly acquired evidence; with the failure to have raised an issue that rates were confiscatory or with any other similar matter wherein the complaining party waives his rights before the hearing agency, is the comparison of black and white. On the one hand, we have guaranteed rights, on the other, rights which may be pre-

served solely by the raising of timely objection. The various and sundry cases referred to by the appellants at pages 19, 20, 21, 22, 23, 24, 25, 26 and 27 of their brief, have no pertinency or relevancy to the issues involved herein nor do cases such as **Myers v. Bethlehem Shipbuilding Corporation**, 303 U. S. 41, where at l. c. 47, wherein this Court said:

> "There is no claim by the corporation that the statutory provisions and the **rules of procedure prescribed** for such hearings are illegal. * * * The claim is that the provisions of the Act (NLRA) are not applicable to the corporation's business at the Fore River Plant, because the operations conducted there are not carried on, and the products manufactured are not sold in interstate or foreign commerce." (Emphasis supplied.)

The Court concluded at l. c. 50 in the Myers case above:

> "The contention is at war with the long settled rule of jurisdictional relief for a supposed and threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter.
>
> "Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing, would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."

The decisions in the cases of **W. J. Dillner Transfer Co. v. United States**, 101 F. Supp. 506, and of **Democratic**

Printing Co. v. Federal Communications Commission, decided on June 12, 1952, in the Court of Appeals for the District of Columbia Circuit, are at variance and directly in conflict with the decision of this Court in **Wong Yang Sung v. McGrath,** supra. The rationale of those decisions cannot be conformed to the unequivocal pronouncement of this Court in the Wong Yang Sung case.

It is with interest that we note the arguments of appellants relative to the impact of the requirements of the Administrative Procedure Act on proceedings under Section 207 (a) of the Interstate Commerce Act. These arguments, however, dissipate themselves under the pronouncement of this Court in **Wong Yang Sung v. McGrath,** supra, wherein it was said, l. c. 41:

> "One purpose (of the Administrative Procedure Act) was to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other. **We pursue this no further than to note that any exception we may find to its applicability would tend to defeat this purpose.**" (Emphasis supplied.)

However, in desperation do the appellants strain when it suggested that appellee was not prejudiced by the resultant order of the Commission. We submit the line has been drawn so thin that this charge merits but little attention other than to point out that the burden of appellee's complaint before the Court was that it was prejudiced and deprived of its property rights through the arbitrary and capricious action of the Commission. Certainly, the assigning of the case to one not a hearing examiner was arbitrary and capricious and the general allegations of the complaint as to appellee's being prejudiced carry over to the defect alleged in the First Amendment to the Petition.

Attempt is made to suggest that Section 7 (a) of the Administrative Procedure Act provides for timely objection to the qualification of the hearing officer. A close reading of this Section points up the fact that Congress was there referring to "bias or disqualification" of either the "agency", "one or more members of the body comprising the agency", or "one or more examiners **appointed** as provided" by the Administrative Procedure Act, and not to non-qualification of the hearing examiner resulting from failure of appointment of such examiner as provided for in Section 11 of the Administrative Procedure Act. In this connection we again advert to the suggestion of the Honorable Rubey M. Hulen, one of the District Court Judges who heard this case below, that the argument of appellants suggests the theory that, "if the appellee goes ahead on the assumption that the Commission will obey the law and follow the law, and he later learns that the Commission did not so act, the rights of the appellee have been extinguished?" We cannot believe that this Court will uphold the contention of appellants on this point.

Appellants admit that **Riss & Co. v. United States**, supra, has decided and put to rest the question of whether or not Section 207 (a) proceedings are of such nature as to require a hearing, and that in the instant case the hearing was not had before a qualified hearing examiner. Such being the case, **Wong Yang Sung v. McGrath**, supra, must rule the case.

Appellants are not aided in their contention by the decision in the case of **Harisiades v. Shaughnessy**, 342 U. S. 580, which they contend held that the lack of qualification of an administrative hearing officer is not jurisdictional in that it invalidates administrative action. If such were the holding in the **Harisiades v. Shaughnessy** case, supra, we submit that **Wong Yang Sung v. McGrath**, supra, and **Riss & Co. v. United States**, supra, were overruled. How-

ever, we do not so read the **Harisiades v. Shaughnessy** case, and we are sure appellants would not so read same had they read footnote 4 on pages 583-584 of 342 U. S. 580 in its entirety. The referred to footnote, as well as the remarks of the Court which gave rise to the footnote, follow:

l. c. 583:

> "Validity of the hearing procedures is questioned for non-compliance with the Administrative Procedure Act which we think here is inapplicable (footnote 4)."

and in footnote 4, l. c. 583-584:

> "Petitioner Harisiades and appellant Coleman contend that the proceedings against them must be nullified for failure to conform to the requirements of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C., Section 1001 et seq. However, Section 12 of the Act, 60 Stat. 244, 5 U. S. C., Section 1011, provides that . . . 'no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.' The proceedings against Harisiades and Coleman were instituted before the effective date of the Act. Harisiades also contends that, the Administrative Procedure Act aside, he was denied procedural due process in that his 1946-47 hearings the same individual acted both as presiding officer and examining officer. However, it appears that the officer here performed both functions with Harisiades' consent. He, therefore, has no standing to raise the objection now."

In the above quoted portion of Section 12 of the Administrative Procedure Act, we have, at least by inference, a Congressional mandate that the procedural requirements of the Administrative Procedure Act are **mandatory** in agency proceedings initiated after the effective date of the Act.

Questions of expediency only have been raised by the appellants in their brief. Of these, we may say that the Commission tried in vain to secure the passage of remedial legislation in the 82nd Congress under the guise of H. R. 5045, which sought to amend the Administrative Procedure Act as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that section 10 (e), subdivision (b), item (4), of the Administrative Procedure Act (Public Law 404, Seventy-ninth Congress) is amended to read as follows:
>
> "'Without observance of procedure required by law, except that no action, findings, or conclusions in any proceeding instituted under the Interstate Commerce Act prior to April 17, 1951, shall be held unlawful or be set aside solely because an officer specified in section 7 (a) did not preside at the hearing and make an initial or recommended decision, unless objection thereto is made prior to the conclusion of the hearing or if the hearing in any such proceeding was begun but not concluded prior to April 17, 1951, and such objection was not made prior to the specified date.'"

This Bill, H. R. 5045, failed of passage. We submit such non-action of the Congress in the face of the decision in **Riss & Co. v. United States**, supra, and in the light of the Commission's advice to the Congress of the result of such decision unless H. R. 5045 were enacted, is tantamount to Congressional and Legislative approval of this Court's construction of the Administrative Procedure Act.

As this Court further said in **Wong Yang Sung v. McGrath**:

> "But the power of the purse belongs to Congress, and Congress has determined that the price for greater fairness is not too high. The agencies, unlike the

aliens, have ready and persuasive access to the legislative ear and if error is made by including them, relief from Congress is a simple matter."

Here relief was sought but Congress deemed that the "price for greater fairness is not too high," for though the Commission had ready access to the legislative ear, a deaf ear was turned on their plea, most probably because the Congress, like this Court, determined that even an arm of the Government cannot violate the law without the imposition of appropriate sanctions. We are still a Government of laws and not of men, expediency cannot defeat Constitutional guarantees, whether such guarantees be of due process or otherwise.

With respect to the argument in appellants' brief at page 32 thereof, we, of course, cannot subscribe to the views expressed therein, particularly in the light of the history of the Riss case recited earlier in appellants' brief. Aside, however, from the questions there raised the fact still remains that the question of validity of the order by reason of the Cunningham case originally having been assigned for hearing to one not a qualified hearing examiner, under the Administrative Procedure Act, has been settled by the express pronouncement of this Court in the Wong Yang Sung case, supra.

C.

Appellants May Not Presume That Appellee Was Not Injured by Reason of the Lack of Qualification of the Hearing Examiner and This Court May Not, Where Basic Constitutional Issues and Rights Are Involved, Consider Matters Not of Record in the Instant Case.

Again, we find the appellants contending that appellee has never alleged that it was actually prejudiced by the fact that the Cunningham application had been heard before an examiner not appointed in accordance with Section

11. As previously indicated, the position of the appellee in the court below with reference to all of the objections raised against the Commission's order was that appellee was prejudiced. However, in the passage of the Administrative Procedure Act, the Congress did not set up prejudice as a test for validity of agency orders or for the requirement that hearings of a quasi-judicial nature be held before qualified hearing examiners. The law will presume that where one acts without authority or in violation of law, prejudice will result. If we are to have an ordered society, such must necessarily be the rule. To contend otherwise would be to permit every citizen to take the law into his own hands as occasion may, in the mind of that citizen, dictate from time to time. We can see no merit to the contention of appellants here, but rather, see in this contention the act of the drowning man grasping for straws. Appellants state that it is doubtful whether such prejudice, as above referred to, would ever exist under Section 207 (a) proceedings. Of course, the applicability of the Administrative Procedure Act to Section 207 (a) proceedings is one for the wisdom of the Congress and not of the administrative agency or the courts. This again was recognized by this Court in **Wong Yang Sung v. McGrath**, supra, l. c. 45.

The arguments of appellants that Sections 5 (c) and 8 (a) are not applicable in the case of hearings on applications for "initial licenses," are of no avail in the light of the decision of this Court in the case of **Riss & Co. v. United States**, supra, which decision the appellants admit in their brief is conclusive of the question that applications for motor carrier certificates of public convenience and necessity under Section 207 (a) of the Interstate Commerce Act must be heard by examiners appointed in accordance with Section 11 of the Administrative Procedure Act.

In further pursuit of appellant's contention that the Administrative Procedure Act and the **Riss & Co. v. United**

States decision, is not controlling in the instant case, a most unusual observation is made at page 35 of appellants' brief and argument to the effect that while the importance of Section 11 is not to be minimized, the requirement of the appointment of examiners subserves the long range objectives of the Act rather than the immediate interest of the parties to administrative proceedings. We have never been apprised of a rule which would hold that to secure the rights of citizens, it is necessary that the same rights be denied to another citizen. We feel that the Supreme Court in the **Wong Yang Sung v. McGrath** case has adequately answered this contention at l. c. 41, wherein the Court stated that:

> "Any exception we may find to its applicability (Administrative Procedure Act), would tend to defeat this purpose,"

and the purpose of the Act which the Court was there addressing itself to was the introduction of greater uniformity of procedure and standardization of administrative practice. Also, the suggestions contained in this portion of the argument suggests that the appellants contend for an affirmative answer to the Honorable Rubey M. Hulen's question noted previously in this brief.

As to Section 10 (e) of the Administrative Procedure Act, we submit that while the provisions of said Section require the Court to take due account of the rule of prejudicial error, that said section further provides that the reviewing court shall hold, "unlawful and set aside agency actions, findings, and conclusions found to be * * *, (2) contrary to Constitutional right, power, privilege or immunity; * * * (4) without observance of procedure required by law."

We submit, in view of the determination of this Court in **Wong Yang Sung v. McGrath**, supra, that failure to conform to the requirements of the Administrative Procedure

Act and more particularly with reference to the holding of hearings before a qualified hearing examiner, renders all subsequent orders of the agency void, accordingly this Court has no alternative other than to sustain the decision and findings of the trial court.

Again, we find resort of appellants to the rule of expediency in its discussion relative to the numbers of cases tried before the Commission after June 11, 1947.

With respect to this contention, we, at the expense of being repetitious, submit:

1. That there has been no evidence of record relative to the factual situation in these cases or even as to the numbers of them, consequently, we submit that this Court cannot give consideration to this argument.

2. That the rule of expediency cannot control where Constitutional rights and guarantees of due process have been violated. The proposition that two wrongs can make a right, we submit, has never been subscribed to by this Court or by this Government.

With respect to the alleged five thousand cases above referred to, no attempt is made to suggest in what percentage of them, if any, questions concerning the qualifications of the hearing examiner was raised. We assume from the gist of the appellants' argument that if such question had been raised before the Interstate Commerce Commission, that the Interstate Commerce Commission will admit that the orders in those cases are invalid. Consequently, this Court cannot be advised merely upon the unverified statement of appellants as to the impact of the decision of this Court upon the Commission or the motor carriers affected by the invalid orders of the Commission in the other cases. Resort is had to the doctrine of laches of the appellants, which, we submit, can have no application, inasmuch as there is no showing in this record by appellants that the

appellee, in the instant case, was at any time earlier advised relative to the status of the examiner who was assigned to hear the instant case. To invoke the doctrine of laches, it is incumbent, of course, upon the appellants to show, among other things, that the appellee was not diligent in determining the invasion of its rights. This, of course, in the instant case would presuppose that the appellee, and for that matter, all citizens in dealing with their Government, must presume that their Government is not acting in accordance with law. We do not believe that this Court will find that a citizen of these United States has such a duty or should be required to indulge in such an unheard of presumption. Should such be the law of the case, we submit that we have done violence to our form of Government.

The arguments indulged in by appellants at pages 37 and 38 relative to rehearings, of course, are highly speculative and remote and are not proper for adjudication in this case. The balancing of equities in the instant case in the manner suggested by appellants would, of course, result in inequity. The suggestion relative to the appointment of many of the examiners as hearing examiners following the Riss & Co. case can lend no validity to the orders of the Commission in the instant case any more than the situation where the trial of a civil action is had in a court of competent jurisdiction before one who has assumed illegally the position of Judge without qualification, but who after having heard and determined the question is later legally appointed and qualified. Such later appointment and qualification cannot have the effect of validating nunc pro tunc the prior unauthorized illegal and invalid action. Nor in the example cited would it be necessary for either one of the litigants to have raised the question of the qualification of the "would-be" Judge at the trial in order to have his invalid judgment or order set aside by an appellate court.

With respect to the entire question of the Congressional attitude towards the Commission's illegal action and violation of the terms and provisions of the Administrative Procedure Act, we submit that the Congress, as previously pointed out, has turned a deaf ear to the plea of the Commission that its invalid action be validated.

D.

Conclusion.

Accordingly, and in conclusion, it is submitted:

1. That this Court has spoken on two previous occasions with respect to the very situation before it in the instant case and has in each instance held the action of the agency invalid where the initial hearing was not had before a hearing officer.

2. Congress, by its non-action on H. R. 5045, has indicated its approval of this Court's decision in both cases and has indicated that it will not dignify or validate violations of law by any branch or arm of our Government.

It, therefore, remains for this Court to affirm the judgment and order of the Court below in the instant case and to give notice to all who would ignore the law that such violations are intolerable under our form of Government.

Respectfully submitted,

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October 10th, 1952.